

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of

DETERMINATION OF ROYALTY RATES
FOR DIGITAL PERFORMANCE IN SOUND
RECORDINGS AND EPHEMERAL
RECORDINGS (WEB IV)

Docket No. 14-CRB-0001-WR
(2016–2020)

iHEARTMEDIA, INC.'S
RESPONSE TO SOUNDEXCHANGE'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW



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INTRODUCTION

SoundExchange agrees with the Services that the evidence in this proceeding is much more “robust” than any prior *Webcasting* proceeding. SX FoF ¶ 1. In *Webcasting I*, the Judges had before them a single benchmark agreement for a noninteractive service. In *Webcasting II*, the record contained only benchmark agreements with interactive services. The same was true in *Webcasting III*, where development of a full record was also hampered by the fact that all of the major webcasters reached settlements under the Webcaster Settlement Act and did not participate. In contrast, the participants in this proceeding include the two largest webcasters and the record here contains 29 benchmark agreements between labels of all sizes and noninteractive services, including one that some 15,000 Merlin members voluntarily adopted.

SoundExchange also agrees with the Services that the new rates do not need to be tethered to the anchor of existing rates. SoundExchange shamelessly proposes a *doubling* of the status quo rates actually paid in the market, from the \$0.0014 per performance currently paid for approximately 80 percent of all webcasting to \$0.0025 to \$0.0029 per performance (or a new 55 percent of revenue term, if that is higher).

But when the record labels negotiate direct licenses with webcasters, as they have done in 29 separate deals, they agree to dramatically lower rates. In every one of these 29 deals, the record labels agreed to effective rates of \$0.0005 or less for additional performances beyond the status quo. Record labels accept these dramatically lower rates for two reasons. First, a wide range of evidence, including from empirical studies, shows that digital radio promotes other music industry revenues, in the same way as terrestrial radio — it breaks artists and drives consumers to buy music, go to concerts, and stream music on-demand. Second, record labels have extraordinarily high profit margins on webcasting, while no Service has ever earned an annual profit from webcasting. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

SoundExchange's Proposed Findings of Fact show that it is not happy with the evidence in the record. As a result, SoundExchange mischaracterizes the record evidence, ignores contrary evidence introduced at the hearing in favor of its pre-filed written statements, and, in many cases, proposes brand new "expert" analyses that were not presented at the hearing, much less supported by any actual witness. Below, we respond to SoundExchange's Proposed Findings of Fact, paragraph by paragraph.

The Judges should conclude that the most economically relevant benchmarks for setting a rate for statutory services from 2016-2020 are the following:

Economic Evidence	Effective Per-Play Rate ¹
iHeartMedia-Warner Agreement: [REDACTED]	\$0.0005 [REDACTED]
27 iHeartMedia-Independent Agreements	\$0.0002
Pandora-Merlin Agreement	[REDACTED]
Fischel/Lichtman "Thought Experiment" – Music Industry Revenues Displaced 25%	\$0.0004
Fischel/Lichtman Economic Value Added Analysis	\$0.0003 to \$0.0005
<i>SDARS II</i> Rate	[REDACTED]

Based on this economic evidence, the Judges should adopt a per-performance rate of \$0.0005 for all statutory services.

¹ See IHM FoF ¶ 190 (iHeartMedia-Warner Agreement: [REDACTED]); *id.* ¶ 192 (iHeartMedia-Warner Agreement: [REDACTED]); *id.* ¶ 219 (27 iHeartMedia-Independent Agreements); *id.* ¶ 233 (Pandora-Merlin Agreement); *id.* ¶¶ 237, 240 (Fischel/Lichtman "Thought Experiment" – Music Industry Revenues Displaced 25%); *id.* ¶ 246 (Fischel/Lichtman Economic Value Added Analysis); *id.* ¶ 259 (*SDARS II* Rate).

GLOSSARY OF PRE-FILED TESTIMONY CITED

Barros WRT	SX Ex. 01	Written Rebuttal Testimony of Glen Barros, President and CEO, Concord Music Group, Inc. (Feb. 22, 2015)
Blackburn WDT	SX Ex. 03	Report of David Blackburn, Ph.D. on behalf of SoundExchange, Inc. (Oct. 6, 2014)
Blackburn WRT	SX Ex. 24	Written Rebuttal Testimony of David Blackburn, Ph.D. on behalf of SoundExchange, Inc. (Feb. 22, 2015)
Burruss WRT	SX Ex. 04	Testimony of Jim Burruss, SVP, Promotion Operations Columbia Records, Sony Music Entertainment (Feb. 22, 2015)
Cutler WDT	IHM Ex. 3338	Testimony of Steven Cutler, EVP, Business Development and Corporate Strategy, iHeartMedia, Inc. (Oct. 7, 2015)
Downs WDT	NAB Ex. 4005	Written Direct Testimony of Ben Downs, Bryan Broadcasting on Behalf of the NAB (Oct. 6, 2014)
Fischel/Lichtman WDT	IHM Ex. 3034	Amended Testimony of Daniel R. Fischel & Douglas G. Lichtman (Jan. 12, 2015)
Fischel/Lichtman WRT	IHM Ex. 3054	Rebuttal Testimony of Daniel R. Fischel and Douglas G. Lichtman (Feb. 22, 2015)
Fischel/Lichtman SWRT	IHM Ex. 3371	Supplemental Rebuttal Testimony of Daniel R. Fischel and Douglas G. Lichtman (Apr. 20, 2015)
Fleming-Wood WDT	PAN Ex. 5002	Written Direct Testimony of Simon Fleming-Wood (on Behalf of Pandora Media, Inc.) (Oct. 6, 2014)
Fowler WRT	SX Ex. 07	Rebuttal Testimony of Jennifer Fowler, SVP, U.S. Marketing & Revenue Generation, Sony Music Entertainment (Feb. 22, 2015)
Harrison WDT	SX Ex. 10	Testimony of Aaron Harrison, SVP, Business & Legal Affairs, Global Digital Business, UMG Recordings, Inc. (Oct. 6, 2015)
Hauser WRT	IHM Ex. 3124	Rebuttal Testimony of John R. Hauser, SC.D. (Feb. 23, 2015)
Herring WDT	PAN Ex. 5007	Written Direct Testimony of Michael Herring on Behalf of Pandora Media, Inc. (Oct. 6, 2014)
Herring WRT	PAN Ex. 5016	Amended Written Rebuttal Testimony of Michael Herring on Behalf of Pandora Media, Inc. (Feb. 20, 2015)
Katz WRT	NAB Ex. 4010	Amended Written Rebuttal Testimony of Michael L. Katz on Behalf of the NAB (Apr. 21, 2015)
Kendall WRT	IHM Ex. 3148	Rebuttal Testimony of Todd D. Kendall (Feb. 22, 2015)

Kooker WDT	SX Ex. 12	Testimony of Dennis Kooker, President, Global Digital Business and U.S. Sales, Sony Music Entertainment (Oct. 6, 2014)
Lexton WRT	SX Ex. 13	Written Rebuttal Testimony of Charlie Lexton, Head of Business Affairs & General Counsel, Music and Entertainment Rights Licensing Independent Network ("Merlin") (Feb. 22, 2015)
Littlejohn WDT	IHM Ex. 3210	Testimony of Jeffrey L. Littlejohn, Executive Vice President for Engineering and Systems Integration, iHeartMedia, Inc. (Oct. 3, 2014)
Littlejohn WRT	IHM Ex. 3640	Rebuttal Testimony of Jeffrey L. Littlejohn, EVP for Engineering and Systems Integration, iHeartMedia, Inc. (Apr. 21, 2014)
Lys WDT	SX Ex.14	Corrected Testimony of Thomas Z. Lys, Ph.D. (Nov. 4, 2014)
McFadden WDT	SX Ex. 15	Testimony of Daniel L. McFadden (Oct. 6, 2014)
Pakman WDT	IHM Ex. 3216	Testimony of David B. Pakman, Partner, Venrock (Oct. 7, 2014)
Pedersen WRT	IHM Ex. 3220	Rebuttal Testimony of Jon D. Pedersen, Sr., SVP and CFO, Radio Markets, iHeartMedia, Inc. (Feb. 22, 2015)
Peterson WRT	NAB Ex. 4013	Corrected Written Rebuttal Testimony of Steven R. Peterson, PH.D. on Behalf of NAB and Pandora Media, Inc. (Mar. 24, 2015)
Pittman WDT	IHM Ex. 3222	Testimony of Robert Pittman, Chief Executive Officer of iHeartMedia, Inc (Oct. 6, 2014)
Poleman WRT	IHM Ex. 3231	Rebuttal Testimony of Tom Poleman, President of National Programming Platforms, iHeartMedia Inc. (Feb. 20, 2015)
Rosin WRT	PAN Ex. 5021	Written Rebuttal Testimony of Larry Rosin on Behalf of Pandora Media, Inc. (Feb. 23, 2014)
Rubinfeld WDT	SX Ex. 17	Corrected Testimony of Daniel L. Rubinfeld (filed Nov. 4, 2014)
Rubinfeld WRT	SX Ex. 29	Corrected Rebuttal Testimony of Daniel L. Rubinfeld (Feb. 25, 2015)
Shapiro WDT	PAN Ex. 5022	Written Direct Testimony of Carl Shapiro on Behalf of Pandora Media, Inc. (Oct. 6, 2014)
Shapiro WRT	PAN Ex. 5023	Written Rebuttal Testimony of Carl Shapiro on Behalf of Pandora Media, Inc. (Feb. 23, 2015)

Shapiro SWRT	PAN Ex. 5365	Supplemental Written Rebuttal Testimony of Carl Shapiro on Behalf of Pandora Media, Inc. (Apr. 21, 2015)
Talley WRT	SX Ex. 19	Written Rebuttal Testimony of Eric L. Talley, Ph.D. (Feb. 22, 2015)
Van Arman WDT	SX Ex. 20	Testimony of Darius Van Arman, Co-Founder and Co-Owner of Secretly Group (Oct. 6, 2014)
Wheeler WDT	SX Ex. 21	Testimony of Simon Wheeler, Director of Digital, Beggars Group (Oct. 6, 2014)
Wilcox WDT	SX Ex. 22	Testimony of Ron Wilcox, Executive Counsel, Business Affairs, Strategic and Digital Initiatives Warner Music Group (Oct. 6, 2014)
Wilcox WRT	SX Ex. 32	Written Rebuttal Testimony of Ron Wilcox, Executive Counsel, Business Affairs, Strategic and Digital Initiatives Warner Music Group (Feb. 22, 2015)

**iHEARTMEDIA'S PARAGRAPH-BY-PARAGRAPH RESPONSE TO
SOUNDEXCHANGE'S PROPOSED FINDINGS OF FACT**

RESPONSE TO PART I – INTRODUCTION

1. This introductory paragraph cites no evidence and no response is required. However, SoundExchange's assertion that its proposal — which relies entirely on a *different* market from the statutory services at issue — is based on “more than 80 real-world agreements” is false. Indeed, SoundExchange's expert, Professor Rubinfeld, relied on only 26 agreements (not 80) in the interactive market as the basis for SoundExchange's rate proposal, which is actually *fewer* agreements than iHeartMedia relied upon from the noninteractive market. *See* Tr. at 6314:25-6316:9 (Rubinfeld); IHM Response FoF ¶¶ 358-360. Thus, it is iHeartMedia's rate proposal that represents exactly the type of “thick market” of agreements — including agreements between a major label (Warner), a consortium of thousands of independent labels (Merlin), and dozens of other independent labels (such as Big Machine), on the one hand, and the two largest webcasting services (iHeartMedia and Pandora), on the other hand, for the very same rights at issue in this proceeding — that the Judges should rely upon here. *See* IHM FoF Part III. Furthermore, SoundExchange is wrong in its assertion that the interactive market it relied upon is “unencumbered by the statutory license,” as its own expert witness contradicted that assertion in his testimony. *See* IHM FoF ¶ 271.

2. SoundExchange is also wrong in asserting that the Services rely on only a “narrow” group of unrepresentative agreements. As set forth in iHeartMedia's Proposed Findings of Fact, iHeartMedia's rate proposal relies on more than two dozen in-market deals that are far more representative benchmark agreements, *see* IHM FoF Part III, and which do not suffer from the number of fundamental, unresolved (and unresolvable) problems with the interactive agreements relied upon by SoundExchange, *see id.* Part V. When the shadow of the

statutory rate is removed from the noninteractive agreements, those deals show that a willing buyer and willing seller in this market would agree to a rate of \$0.0005. This proceeding is thus the first time since *Webcasting I* — which set a rate of \$0.0007 per performance — that *any* agreements between labels and noninteractive services were presented to the Judges to support a rate proposal, and the first proceeding in which the record contains “thick” evidence of such agreements, with a major label, the “fourth” major (Merlin), and some of the most-sophisticated independent labels with today’s hottest artists (*e.g.*, Big Machine and Taylor Swift). Those agreements support a fundamental rethinking of the rates from *Webcasting II* and *III*, which were based on flawed analogies to agreements with interactive services. Those agreements also thoroughly refute SoundExchange’s effort to establish a rate for the next five years that is double the Pureplay rate currently paid by approximately 80 percent of the webcasting market and at which *no* webcaster is currently profitable. Finally, SoundExchange misleadingly cites the testimony of Professor Lichtman, where he explained in response to Judge Strickler’s questions that the statutory shadow was a reason to reject *SoundExchange’s* “greater of” formula, given that the evidence showed that the percentage-of-revenue prong in the agreements he was discussing was included merely to influence the statutory rate-making proceeding and was set so high that no party expected it would ever be triggered. *See* Tr. at 4016:14-4017:25 (Lichtman).

3. iHeartMedia refers the Judges to Pandora’s response.

4. SoundExchange’s assertion ignores the more than two dozen iHeartMedia deals with independent labels that iHeartMedia also relies upon, as well as the Pandora agreement with thousands of Merlin labels that support iHeartMedia’s rate proposal. *See* IHM FoF Parts III.C & D. SoundExchange is also wrong for numerous reasons in asserting that the “incremental” rate revealed by those various deals was “debunked” at the hearing. Nor is SoundExchange

correct that iHeartMedia's experts "simply refused" to value non-monetary elements of the Warner deal, because — as Professor Fischel explained — the parties to that agreement did not themselves value those elements in analyzing and modeling the deal in deciding to enter into it. *See* IHM FoF Part III.B.4.

5. iHeartMedia refers the Judges to NAB's response.

6. SoundExchange is wrong to suggest that webcasting is "vibrant" based on the entry of a handful of large companies like Apple and Google that use webcasting primarily as a way to promote other lines of business, regardless of whether they can earn a profit from webcasting alone. The growth of webcasting has been stymied due to the high royalty rates that have prevented *any* webcasters from ever enjoying a *single profitable year* in the more than 15 year history of the industry. *See* IHM FoF Part I.D.3. To the extent that SoundExchange is suggesting that webcasting is actually causing a decline in consumer purchase of physical or digital music, the evidence contradicts that suggestion. As iHeartMedia demonstrated in its Proposed Findings of Fact, the evidence in this case — including empirical studies performed by both the Services and SoundExchange, the testimony of the most knowledgeable industry insiders, and the internal documents and conduct of the record labels themselves outside the rate-making proceeding — demonstrates that both terrestrial and digital radio are powerful promotional tools for music sales. *See* IHM FoF Part II. Indeed there is *no* evidence, aside from the self-interested say-so of record label lawyer-witnesses, of *any* substitution.

7-8. The evidence shows that there is no "convergence" between interactive and noninteractive services that could support use of agreements with interactive services as benchmark agreements in this proceeding, particularly when the Judges have been provided with

agreements with literally *thousands* of labels for the very same statutory webcasting services at issue. *See* IHM FoF Parts III and V.D.

9. iHeartMedia agrees with SoundExchange that “the rates the Judges set will have an enormous impact on the webcasting market.” But as the record has demonstrated, only by having significantly *lower* statutory rates can webcasters hope to thrive and to likewise grow the pie for artists and for the future of recorded music more generally. *See* IHM FoF Parts I.D.3 & 4.

10-23. These paragraphs preview the organization and contents of the upcoming sections of SoundExchange’s Proposed Findings of Fact, and they cite no evidence in support of the summaries of arguments contained within those sections. iHeartMedia refers the Judges to the substantive responses set forth below as to each of the sections and individual paragraphs of SoundExchange’s proposed findings.

RESPONSE TO PART II – BACKGROUND

24-26. These paragraphs describe SoundExchange’s status as the statutory collective designated to receive royalty payments under various statutory licenses. iHeartMedia does not oppose SoundExchange’s continuing appointment as that collective.

27-28. These paragraphs describe SoundExchange’s internal corporate structure, and no response is required.

29. This paragraph describes SoundExchange’s — and by extension, the record labels’ — remarkable revenues attributable to streaming in recent years and months. These data reflect the record labels’ current robust financial position. *See* IHM FoF ¶¶ 61-74.

30-32. These paragraphs describe SoundExchange’s activities, mission, and administrative costs. No response is required.

33-34. These paragraphs purport to describe an increase in the number of webcasters operating pursuant to the statutory license. Although the *number* of webcasters may have increased, that number is economically irrelevant. *See* Peterson WRT ¶¶ 5(d), 28-34 (“[L]ooking at webcaster counts alone presents a highly misleading picture of the statutory webcasting industry because the bulk of royalties are paid by a small share of webcasters . . .”). SoundExchange’s number includes thousands of noncommercial webcasters and thousands more very small webcasters. *See* SX FoF ¶ 35 & Figure 2. Putting those small webcasters to one side, the top ten webcasters comprise the vast majority of all royalty payments, [REDACTED]. [REDACTED]. These figures reflect the reality that only a handful of webcasters have attempted to stake their business on webcasting.

It is no mystery why there are so few companies that make webcasting their primary business: webcasting remains unprofitable. As a result, webcasters are forced to engage in cost-mitigation strategies that render their products less desirable for consumers. *See* Pittman WDT ¶ 11 (“[D]espite the undeniable popularity of their product, Internet radio companies are struggling to survive.”); IHM FoF ¶ 34; [REDACTED]. [REDACTED]. It is undisputed that *no* webcaster has ever earned an annual profit. *See* IHM FoF ¶ 41.

35. This paragraph describes the license categories created for the prior rate period. Figure 2 summarizes the number of webcasters operating pursuant to each of the license categories. But Figure 2 is misleading. It lists only five webcasters operating pursuant to the Pureplay rate for 2012 and 2013 [REDACTED]. [REDACTED]. Because

Pureplay rates are so much lower than the rates applicable to commercial broadcasters, Pandora's share of webcasting *spins* is even higher. [REDACTED]

[REDACTED] In any event, because of current statutory rates, those small webcasters stand to *lose* money if they gain market share. *See* Downs WDT ¶¶ 2, 20.

36. This paragraph describes the number of webcasters paying only the minimum statutory fee. iHeartMedia takes no position on the appropriate minimum fee.

37-58. These paragraphs describe the history of prior *Webcasting* proceedings. iHeartMedia's account of those proceedings was set out in its Proposed Findings of Fact. *See* IHM FoF ¶¶ 1-7.

59-71. These paragraphs describe the history of the instant proceeding. iHeartMedia's account of these proceedings was set out in its Proposed Findings of Fact. *See id.* ¶¶ 8-10.

72-95. These paragraphs describe the testimony of SoundExchange's witnesses. Responses to the substance of each witness's testimony are set out below, insofar as SoundExchange relies on that testimony to support its proposed findings of fact.

96-97. These paragraphs summarize the testimony of other participants' witnesses. Where appropriate, summaries and citations to those witnesses' testimony are set out in responding to SoundExchange's proposed findings of fact.

98-109. These paragraphs purport to describe the testimony of iHeartMedia's witnesses. SoundExchange omits reference to iHeartMedia's qualification of its expert witnesses. iHeartMedia qualified the following experts at the hearing: Todd Kendall (economics and econometric analysis, Tr. at 3204:9-14); Douglas Lichtman (economic analysis, Tr. at 3977:22-25); Daniel Fischel (economic analysis and valuation, Tr. at 5306:24-5307:3); John

Hauser (conjoint survey design and analysis, Tr. at 5559:16-21); and David Pakman (investment in the music industry, Tr. at 6210:22-6213:23). Discussion of iHeartMedia's witnesses' testimony can be found in its Proposed Findings of Fact and in its responses to SoundExchange's Proposed Findings of Fact.

110-133. These paragraphs summarize the testimony of other Service participants' witnesses. Discussion of those witnesses' testimony can be found in its Proposed Findings of Fact and in its responses to SoundExchange's Proposed Findings of Fact.

134-137. These paragraphs describe the CBI settlement. iHeartMedia does not oppose the CBI settlement.

138-141. These paragraphs describe the NPR/CPB settlement. iHeartMedia does not oppose the NPR/CPB settlement.

RESPONSE TO PART III – THE STATUTORY STANDARD

142. This paragraph quotes in part 17 U.S.C. § 114(f)(2)(B). No response is required.

143. This paragraph cross-references Section I of SoundExchange's Proposed Conclusions of Law. iHeartMedia refers the Judges to Parts I through V of its Proposed Conclusions of Law, as well as Parts I and III of its Response to SoundExchange's Proposed Conclusions of Law, which address the statutory standard for rate-setting in this proceeding.

144. This paragraph cross-references Section II of SoundExchange's Proposed Conclusions of Law. iHeartMedia refers the Judges to Part III of its Proposed Conclusions of Law, as well as Part III of its Response to SoundExchange's Proposed Conclusions of Law, both of which explain why the Judges cannot, consistent with the statute, presume that the record labels that are the willing sellers in the hypothetical negotiation do not and will not compete with each other.

145. This paragraph incorporates by reference SoundExchange’s legal arguments. No response is required.

146-147. These paragraphs contain legal argument. iHeartMedia refers the Judges to Part II of its Proposed Conclusions of Law — as well as Part V of its Proposed Findings of Fact — which demonstrate why, as a matter of law and fact, the Judges should reject SoundExchange’s reliance on agreements between labels and interactive services to set the rates for the noninteractive services that are subject to the statutory license.

148. This paragraph selectively quotes the testimony of Professor Shapiro, but ignores the remainder of his answer, in which he explained that Professor Rubinfeld “is wrong” to refuse to use direct licenses with statutory services — “including iHeart[Media]-Warner” — as benchmark agreements to set the statutory rate. Tr. at 2669:17-22 (Shapiro); *see* Tr. at 2670:3-4 (Shapiro) (testifying that the need to account for the shadow of the statutory licenses “doesn’t mean throw [a direct license] out if it’s [with] a statutory service”). Furthermore, SoundExchange ignores that Professor Rubinfeld testified both that agreements with interactive services are “affected to a certain degree by the statutory and pureplay settlement rates” and, moreover, that he did “*not make any . . . adjustment*” to “remove the effects of the shadow before using [interactive agreements] as the basis for a benchmark.” IHM FoF ¶ 271 (quoting Rubinfeld WDT ¶¶ 91, 133 (emphasis added)).

149. In purporting to summarize portions of Professor Talley’s testimony, SoundExchange ignores that Professor Talley agreed that “no rational buyer would ever be willing to enter into a negotiated, consensual license calling for her to pay a price equal to or exceeding [the] statutory rate.” Talley WRT at 47. That testimony refutes SoundExchange’s continued claim that [REDACTED]

Moreover, SoundExchange ignores Professor Rubinfeld's concession that the existence of direct licenses for noninteractive services at rates below the statutory rate (or NAB or Pureplay rates) is evidence that "existing statutory rates [are] 'too high.'" Rubinfeld WDT ¶ 166.

150. This paragraph cross-references other sections of SoundExchange's Proposed Findings of Fact. No response is required.

151. The *Webcasting III Remand* decision does not, as SoundExchange implies, hold that agreements with interactive services are superior benchmarks to agreements with noninteractive services. The record in that case contained *no* agreements with noninteractive services and, even then, the Judges found that — with a record containing exclusively agreements with interactive services — such agreements are only "of assistance in establishing a zone of reasonableness," and then "only after making certain significant adjustments." *Webcasting III Remand*, 79 Fed. Reg. at 23115; *see also* IHM Response FoF ¶ 148 (noting testimony of Professor Rubinfeld that he made no adjustment to account for the effect of the statutory shadow on interactive agreements). iHeartMedia further refers the Judges to Part V of its Proposed Findings of Fact — as well as Part II of its Proposed Conclusions of Law — which demonstrate why, on the record here which contains evidence of 29 direct licenses (one of which was voluntarily opted into by some 15,000 members of Merlin), the Judges should not rely on agreements between record labels and interactive services to set the rates for the noninteractive services that are subject to the statutory license.

152. Although SoundExchange in this paragraph acknowledges Professor Rubinfeld's testimony that agreements with interactive services are "affected to a certain degree by the statutory and pureplay settlement rates," Rubinfeld WDT ¶ 91, SoundExchange ignores

Professor Rubinfeld’s concession that he did “*not make any . . . adjustment*” to “remove the effects of the shadow before using [interactive agreements] as the basis for a benchmark.” *Id.*

¶ 133. That failure — among many others — prevents the Judges from relying on his analysis of interactive agreements to set the rate for noninteractive services. *See generally* IHM FoF Part V.

153. As with Paragraph 148, this paragraph selectively quotes testimony of Professor Shapiro. *See* IHM Response FoF ¶ 148.

154-156. These paragraphs contain assertions about the effect of the shadow of the Pureplay rate on the Pandora-Merlin Agreement, into which some 15,000 Merlin members voluntarily opted. *See* Tr. at 4222:20-25, 4224:1-16 (Herring); [REDACTED]. In making these assertions, SoundExchange ignores the record evidence [REDACTED]

[REDACTED]; *see* IHM FoF ¶¶ 232-233. Moreover, SoundExchange’s assertions regarding the testimony of Professor Talley ignore the fact that he admitted that his “theoretical” bargaining model was not based on, and Professor Talley did not consider, *any* evidence from this proceeding regarding the actual negotiations or agreements entered into by the parties, and thus he did not calibrate his model to the real world. *See* Tr. at 6031:11-25 (Talley) (admitting, on questions from Judge Strickler, that the “discovery dealing with the actors who are actually involved in this proceeding” would help “to move from the theoretical to the practical”: “So I think that would be a helpful piece of information . . . that you would be interested in if you were trying to

calibrate it.”); Tr. at 6021:11-24 (Talley) (testifying to the “theoretical results of [his] structural modeling”).

157-158. These paragraphs contain assertions about the effect of the shadow of the NAB and statutory rates on the iHeartMedia-Warner Agreement and iHeartMedia’s agreements with 27 independent record labels. In making these assertions, SoundExchange ignores the wealth of evidence — discussed further below — that shows that both Warner and the independent labels were willing to agree to rates substantially lower than the NAB, statutory, and Pureplay rates in exchange for iHeartMedia’s agreement to increase its plays of their sound recordings. *See generally* IHM FoF Part III. Because those additional plays would not have occurred under the statutory license — and Warner and the independent labels were free to walk away without reaching an agreement — the rate for those additional (or incremental) plays provides the best evidence in the record of the rate to which a willing buyer and willing seller would agree for noninteractive service in a hypothetical market without a statutory license. *See id.*; *see also* IHM CoL Parts I-III.

159. Admitted.

160. In partially quoting testimony from Steven Cutler, iHeartMedia’s Executive Vice President for Business Development and Corporate Strategy, SoundExchange ignores his unambiguous testimony that iHeartMedia entered the agreement with Warner [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; *see* IHM FoF ¶¶ 91-93. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

161. In relying on Professor Rubinfeld's pre-filed testimony to support its claim that

[REDACTED]

[REDACTED] SoundExchange ignores Professor Rubinfeld's testimony that he [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

see also IHM FoF ¶¶ 352-355.

162. In repeating the assertion from Professor Rubinfeld's pre-filed testimony that Apple's agreements with Sony and Warner were not intended to be used in this proceeding and, therefore, "may well be less in the shadow of the statutory proceeding" than the direct license agreements on which the Services rely, SoundExchange again ignores the evidence introduced at the hearing. In fact, as iHeartMedia detailed in its Proposed Findings of Fact, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; *see also* IHM FoF ¶¶ 359-362 (detailing additional evidence that SoundExchange ignores). Moreover, the existence of the [REDACTED]

[REDACTED] in these agreements demonstrates that the parties were, in fact,

[REDACTED]. *See, e.g.,* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

163. This paragraph notes Apple's ability to obtain additional revenue from downloads through its iTunes store that are not available to the representative webcaster. As iHeartMedia explains, these additional benefits uniquely available to Apple are yet another reason to reject SoundExchange's belated reliance on the Sony and Warner agreements with Apple to support its rate proposal. *See* IHM FoF ¶¶ 385-388; IHM CoL Part IV.

164. SoundExchange cites no evidence at all to support its assertions in this paragraph about the [REDACTED] in Apple's agreements with Sony and Warner. The Judges, therefore, cannot accept this proposed finding which, in any event, is contradicted by record evidence. *See* IHM FoF ¶¶ 380-384.

RESPONSE TO PART IV – THE RECORD INDUSTRY IS EXTREMELY PROFITABLE

165. This paragraph provides a preview of the following sections and cites no evidence at all in support of its assertions. The Judges, therefore, cannot accept this proposed finding, and no further response is necessary.

166-174. The assertions SoundExchange makes about the role of artists and the costs they incur in creating music ignores the testimony from iHeartMedia's CEO and Chairman, who explained that lowering statutory royalty rates is the best "win-win" solution, not only for statutory webcasting, but also for artists, record labels, and the recorded music industry more

generally. *See* IHM FoF ¶¶ 55-58 (“Even with lower royalty rates, ‘[t]he overall money paid to record companies and artists can increase, as a lower rate causes volumes to increase — and total revenue paid to the music industry is equal to rates times volume — and that’s a win-win for all parties.’”).

175-195. SoundExchange’s description of the role record companies play — and certain costs the labels incur in bringing recorded music to consumers — ignores that these costs have been decreasing as a result of the transition to digital, *see* IHM FoF ¶ 75, and that labels could reduce them further. *See, e.g.*, Warner 2014 Annual 10-K (IHM Ex. 3637 at 5) (“*Flexible Cost Structure with Low Capital Expenditure Requirements.* We have a highly variable cost structure, with substantial discretionary spending and minimal capital requirements . . .”). It also ignores the segment of the music industry involving musicians who are able to record music on their own and then make that music available on streaming services, further allowing labels to reduce costs without eliminating the production of valuable music. *See* Tr. at 6065:15-6067:1 (Talley) (“CHIEF JUDGE BARNETT: . . . If the . . . major record labels have costs, fixed costs that they have to recover and they decide they’re not recovering them for whatever reason, it’s not going to stop music, right? A: It may well be the case — in fact, it probably is the case already, there’s a segment of the music industry . . . in which people are recording things in their bedroom and posting it on YouTube.”).

196-203. SoundExchange’s description of the marketing and promotion efforts undertaken by record labels omits any discussion of the role statutory streaming services like iHeartMedia play in “breaking” recording artists. The record here includes the testimony of knowledgeable industry insiders, the actions of the record labels themselves, the internal analyses and studies reported in the internal documents of the record labels, studies done by the

Services, and three different empirical analyses of extensive volumes of data by three different expert economists. All of that evidence proves that digital radio promotes sales, and does not substitute for sales. *See* IHM FoF Part II.

204-216. These paragraphs summarizing the process, costs, and risks that record labels incur in distributing music — including for physical records — ignore the substantial cost savings and significantly higher margins that the labels enjoy on digital music in general and digital radio in particular, which are likewise helping to restore the health of the record industry. *See id.* ¶¶ 75-78. Indeed, in 2013, Universal’s profit margin on digital music was over [REDACTED], as compared to only [REDACTED] for its physical business, and its overall margins are [REDACTED]. *See id.* ¶¶ 65-66. Similarly, Sony’s profit margin was [REDACTED] for digital music generally and more than [REDACTED] for digital radio in 2014 — much higher than the [REDACTED] margin on physical sales. *See id.* ¶ 69. And for Warner, an internal analysis has described SoundExchange revenue as a business with [REDACTED]. *See id.* ¶ 72; Warner 2014 Annual 10-K (IHM Ex. 3637 at 5) (“*Continued Transition to Higher-Margin Digital Platforms*. . . . Due to the absence of certain costs associated with physical products, such as manufacturing, distribution, inventory and returns, we continue to experience higher margins on our digital product offerings than our physical product offerings.”).

If record-label revenue protection were the goal of rate setting (it is not, *see* IHM CoL Part V), the current rates paid by webcasters are higher than necessary even under extreme assumptions about webcasting displacing other sources of record label revenue. Professors Fischel and Lichtman performed a “thought experiment” — which SoundExchange says nothing about in its proposed findings of fact — that assumed, contrary to the evidence, that listening to noninteractive services substituted for other record label revenue streams. If noninteractive

webcasting displaced 25 percent of record label revenue, a per-performance royalty of only \$0.0004 would suffice to maintain revenues at current levels. Even if webcasting displaced 100 percent of other record label revenue, a per-play rate of \$0.0014, which is much lower than either existing statutory rates or SoundExchange's rate proposal for the future, would maintain record labels' revenues at current levels. *See* IHM FoF Part IV.A. The analysis makes no adjustment for the fact that record labels enjoy and realize much higher margins on digital radio, such that shifting all listening to a digital format would actually *improve* record labels' financial condition and bottom line beyond just the maintenance of current revenues.

217-219. SoundExchange's claim that revenues from noninteractive streaming are "critical" for artists and record companies is inconsistent with the evidence showing that statutory webcasting remains a very small portion of overall music listenership and the market more generally. *See id.* ¶ 33. It also ignores evidence that the best way to increase revenue across the industry more generally — including for artists and the labels — is to lower statutory rates so that webcasting is sustainable in the future. *See id.* ¶¶ 55-58.

220. Although SoundExchange claims that, "[a]t current rates, webcasters are not paying market rate returns to artists and content owners," the evidence shows that, in fact, thousands of labels (including Warner, Big Machine, Merlin and others) have negotiated voluntary deals with iHeartMedia and Pandora where they will receive lower rates — both on average and incremental spins. Unlike the testimony provided by record label licensing lawyers in this proceeding, these real-market deals provide the best evidence of the rate to which a willing buyer and willing seller would agree in the absence of a statutory license; and the lower per-play rates agreed to in these deals demonstrate that record labels in reality want more

performances of their music on these statutory services because digital radio promotes. *See generally id.* Part III.

RESPONSE TO PART V – INTERACTIVE SERVICES AND ALLEGED CONVERGENCE WITH NONINTERACTIVE SERVICES

221. This paragraph contains legal argument, not proposed factual findings.

SoundExchange, moreover, is wrong to contend that the Judges should consider interactive agreements as benchmarks in its analysis. In-market agreements are preferable to agreements that require multiple adjustments. *See* IHM FoF Part V; IHM CoL Part II.

222. iHeartMedia admits that the digital music marketplace has evolved and is evolving, as described in Parts I.D & E of iHeartMedia’s Proposed Findings of Fact.

223-225. These paragraphs merely summarize the sections that follow, and any factual contentions in those sections are addressed below.

226-231. These paragraphs describe a shift in the music industry from “[p]hysical to [d]igital [s]ales” and a corresponding decline in recorded music revenues. As SoundExchange acknowledges a few paragraphs later, however, the decline in revenues is due to “[m]ultiple factors,” including “online piracy (through services like Napster and others) changes in technology, and changes in consumer preferences.” SX FoF ¶ 234. There is literally *no* evidence demonstrating that streaming — much less statutory webcasting — is the cause of that decline, as SoundExchange’s own fact and expert witnesses have conceded. *See* IHM FoF ¶¶ 79-85, 158 (detailing that Dr. Blackburn found no evidence that noninteractive services substitute for music sales). Indeed, the overwhelming evidence in this proceeding — including testimony from industry insiders with the most knowledge, the conduct of the record labels outside of this proceeding, and empirical studies performed both outside this proceeding and by

experts from both sides within this proceeding — demonstrates that statutory webcasting promotes the sale of recorded music. *See id.* Part II.

232. This paragraph alleges that sales of downloads have recently “flattened and started to decrease,” citing the testimony of Mr. Kooker. But Mr. Kooker’s testimony discusses only a few recent quarters of data, *see* Kooker WDT at 13, which is insufficient to draw conclusions about industry trends. [REDACTED]

[REDACTED]

[REDACTED].

Nor has SoundExchange provided any evidence linking any supposed decline in download sales to statutory webcasting. *See* IHM FoF ¶ 158. Moreover, Mr. Harrison testified that Universal’s streaming revenues are growing fast enough to offset any supposed decline in digital downloads. *See* Tr. at 1155:8-20 (Harrison).

233. This paragraph claims that both major and independent labels project sales of downloads to decline in the future. SoundExchange cites the testimony of three label witnesses (Kooker, Wheeler and Harrison) who merely offer speculative and unsupported assertions from which no conclusions can be drawn. Even accepting these claims, however, there is no basis to conclude that statutory webcasting will be the reason for any such decline. *See* IHM FoF ¶¶ 79-85.

234. Admitted.

235. This paragraph claims that the loss in industry revenues has resulted in a loss of jobs. Even if true, this is unrelated to statutory webcasting. The decline in physical media such as CDs has changed the traditional role of the record label and reduced the costs — including the labor costs — to manufacture, store, and transport music, among other things. *See* IHM FoF

¶¶ 75-76; [REDACTED]

[REDACTED]. This declining cost structure has enabled record companies to become more profitable, not less, as result of the migration to digital music. *See* IHM FoF ¶¶ 64-76.

236. This paragraph asserts that “substantial investments in digital infrastructure” are still required. What SoundExchange neglects to mention, however, is that these investments are far less “substantial” than what was required in the pre-digital marketplace. That is why the record labels have extremely high margins on their digital business — [REDACTED] — and have told their shareholders that they will be more profitable than ever. *See id.*

237-243. These paragraphs allege a “[s]hift from [o]wnership to [a]ccess [m]odels,” and provide statistics showing that the number of consumers using webcasting is increasing and that revenues from webcasting account for an increasing share of record industry revenues every year. SoundExchange’s characterization of this shift is misleading in at least two fundamental respects.

First, it ignores that “ownership” is still the largest source of music industry revenues by a wide margin. Sales of recorded music in the form of digital downloads, CDs, and vinyl still generate the vast majority of record label revenue. *See* Music Industry Revenue by Format 1982-2013 (Rubinfeld WDT Ex. 1) (graph of sources of music industry revenue, showing that music sales are still by far the largest source); Tr. at 366:6-8, 13-16 (Kooker) (physical sales account for 28 percent of total U.S. revenues; digital revenues account for 72 percent of total U.S. revenues, of which digital downloads account for 60 percent); [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]; Fischel/Lichtman WRT ¶ 25
(industry analyst firm MIDiA in 2014 indicate that in 2019, approximately half of recorded music revenue will still be derived from music sales).

Second, statutory webcasting is not displacing the ownership model, but growing the pie for the entire industry, giving consumers and the industry a viable alternative to forms of consumption that provide much less (or zero) compensation to copyright holders, such as terrestrial radio, piracy, and YouTube. *See, e.g.*, [REDACTED]

[REDACTED]; Shapiro WRT at 54-60 (demonstrating that

statutory services add to record company revenue by displacing listening on terrestrial radio); Tr. at 1629:21-1630:3 (Blackburn) (“I don’t take it as particularly controversial that there’s some listening that’s being drawn away from terrestrial radio.”); Tr. at 1409:17-1410:5 (Harleston) (“[w]hen possible” Universal tries to flip consumers from piracy to streaming because Universal receives revenues only for the latter).

244. This paragraph consists solely of lawyer argument and should not be accepted by the Judges. Nothing in the record supports SoundExchange’s claim that copyright owners increasingly depend on revenues from “the act of listening to music and not solely from the sale of copies of music.” Moreover, such claims ignore that most consumers are simply unwilling to pay a significant amount to listen to music. *See, e.g.,* Fischel/Lichtman WRT ¶ 12 (“Interactive services are far more commonly sold to consumers through subscriptions, whereas almost all non-interactive listening is ad-supported.”); [REDACTED]

[REDACTED]; Rosin WRT at Figures 6-8 (88 percent of active users of noninteractive services are either “not at all likely” or “not very likely” to pay \$9.99/month for an on-demand music service;

70 percent are not likely to pay \$4.99/month, and 57 percent are not likely to pay \$2.99/month.); Shapiro WRT at 45 (“Another reason why interactive services are not an especially close substitute for statutory webcasting services is that relatively few people are willing to pay \$9.99 per month for an on-demand music service.”).

245. This paragraph concedes that record labels engage in promotion on terrestrial radio in order to increase public exposure to music, drive sales, and break new artists. There is no evidence to support SoundExchange’s claim that record labels engage in this promotion due to “the constraints of the medium (such as single programs broadcast to the same broad but geographically limited audience),” and thus there is no evidence to support an assertion that promotion is different or less effective when music is played on digital radio. Nor does this argument make economic sense: Successful promotion depends on repeated exposure to the largest possible audience.

246-249. These paragraphs quote the testimony of SoundExchange’s label witnesses (Kooker, Wheeler, Harrison, and Wilcox) describing their view that revenue from webcasting is increasingly important to their respective labels’ business. These self-serving assertions, even if true, obscure several important points: that music sales are still the largest source of record industry revenue; that statutory webcasting grows industry revenues without cannibalizing sales or other sources of revenues; and that record labels are motivated primarily not by growing their revenues but their profits, which have been robust. *See* IHM FoF Part I.E.1. The assertions also ignore the fact that statutory webcasting remains a very small portion of overall music listenership and the music industry more generally. *See* IHM FoF ¶ 33.

250. Citing only Mr. Kooker, this paragraph claims that copyright owners are “struggling to monetize” at a rate that “actually produces growth.” Mr. Kooker’s testimony is

not a sufficient or reliable basis for drawing conclusions about the entire record industry, particularly given that neither he nor any other record label witness provided financial data. In fact, the record labels' financial statements debunk SoundExchange's claim and show that each of the major labels is in excellent financial condition, [REDACTED]

[REDACTED]. See IHM FoF ¶¶ 63-76.

251-252. These paragraphs assert that record labels have begun to focus on “average revenue per user, ARPU” rather than “transaction-based metrics” such as sales of downloads or CDs. But nothing in the statute guarantees the record industry any set level of revenues. See IHM CoL Part V. Nor is this claim credible given that transaction-based sales still account for the bulk of industry revenues. See IHM Response FoF ¶¶ 237-243.

253. This paragraph argues that the ARPU from webcasting can exceed the ARPU from download sales, but that ARPU for ad-based services is significantly lower than for subscription-based services. SoundExchange relies solely on the hearing testimony of Mr. Kooker, but neither he nor any other SoundExchange witness provided financial documents or other information to verify their assertions. See Tr. at 374:11-375:15 (Kooker). Nor are Mr. Kooker's figures credible on their face. They plainly do not represent an “average” of all consumers, because the overwhelming majority of consumers pay nothing to listen to music, and are unwilling to do so. See IHM Response FoF ¶ 244. The fact that some subset of consumers is willing to pay significant amounts for downloads or on-demand services in no way suggests that other consumers would be willing to pay comparable amounts for alternatives, such as statutory services, with much less functionality. See *id.* Total revenues are more relevant than average revenues. Furthermore, because ad-supported services attract far more listeners than paid-subscription services, they are capable of generating more total revenue, even if their ARPU is

lower. In addition, in this paragraph, SoundExchange makes no comparison to physical sales and thus ignores the fact that digital margins are significantly higher — [REDACTED]

[REDACTED] See IHM Response FoF ¶ 236.

254. This paragraph claims that the record labels' agreements with interactive services include [REDACTED]. There is no evidence to suggest that this same strategy would or could be applied to statutory services, however. To the contrary, consumer willingness to pay subscriptions for access to premium tiers of statutory services (*e.g.*, ad-free versions) is demonstrably lower than consumer willingness to pay for interactive services. Only 4 percent of Pandora subscribers and no iHeartMedia listeners are paid subscribers, as compared to 25 percent of Spotify listeners. See Fischel/Lichtman WRT ¶ 12; Rubinfeld WDT ¶¶ 70, 72 & Exhs. 7a, 7b; [REDACTED]

[REDACTED]. As Professors Fischel and Lichtman explain, the fact that interactive services rely so much more on a subscription revenue model than do noninteractive services suggests that consumer demand for these services remains very different. See Fischel/Lichtman WRT ¶ 12. There is simply no evidence to support SoundExchange's theory that consumers who historically and currently prefer an ad-supported lean-back service can be "converted" to paid subscribers of some premium service.

255. This paragraph asserts that Spotify [REDACTED]

[REDACTED]. SoundExchange cites only Mr. Kooker, who has no basis to testify about [REDACTED]

[REDACTED]. In any event, if Spotify has [REDACTED]

[REDACTED]. As noted above, Spotify has more than six times the number of paid subscribers as Pandora. *See* IHM Response FoF ¶ 254. Moreover, the record demonstrates that the biggest impediment to higher subscription rates of interactive services is not the existence of statutory services, but the availability of free-to-the-consumer sources of *on-demand* listening, including free versions of interactive services with nearly identical functionality to paid versions, as well as other free on-demand alternatives such as YouTube and piracy. *See, e.g.,* [REDACTED]

[REDACTED]; IHM FoF ¶¶ 46, 82 (discussing constraints from YouTube and piracy).

256. This paragraph argues that ad-supported statutory services are a major impediment to consumers converting to paid-subscription services. SoundExchange cites only Mr. Kooker, but neither he nor any other witness provided data or analysis to support such a claim. Mr. Kooker merely stated that “it’s challenging to convince a consumer to open their wallet and pay for something that is very similar to something that is available to them for free.” Tr. at 376:1-6 (Kooker). Although this testimony may explain why most Spotify users choose the free version of the service rather than the paid version, it does not follow either logically or empirically that free versions of statutory services limit paid subscriptions to interactive services. The evidence instead shows that other factors — such as the availability of free versions of interactive services, YouTube, and piracy — are the principal obstacles to convincing consumers to open their wallets. *See* IHM Response FoF ¶ 255.

257. This paragraph argues that the line between between interactive and statutory services is “increasingly blurred,” and that the distinction between these services is “as much (if not more so) the result of the existence of the statutory license as it is of the fact that a Spotify listener can select a particular sound recording on-demand.” But the scope of the statutory license is not becoming more blurred. And the statutory license prohibits statutory services from offering sound recordings on-demand. The evidence shows that noninteractive and interactive services are distinct. SoundExchange itself proposes that the extra-statutory functionality is worth a 2x multiplier in adjusting its supposed interactive service benchmarks. All of the principal economic experts in this proceeding — including SoundExchange’s — agree that on-demand capability is important and valuable. *See* Fischel/Lichtman WRT ¶ 11 (“Clearly, the most important difference between interactive and non-interactive service is that interactive services offer on-demand functionality, while non-interactive services do not.”); Tr. at 2136:23-2137:4 (Rubinfeld) (“Q. You would agree with me, would you not, that the statutory services and these benchmarks that you’ve chosen have significantly different functionality, correct? A. They do have — they do have different functionality. I think it is significant compared to the statutory services.”); Tr. at 1772:12-14 (Rubinfeld) (“So the — offerings of the two types of services [interactive and statutory] aren’t identical. There still are important differences.”); Shapiro WRT at 44 (“Regarding functionality, both terrestrial radio and statutory webcasters are lean-back, while interactive services are lean-forward.”); Tr. at 2861:22-2862:17 (Katz) (interactive benchmark requires “some form of adjustment to get back to noninteractive services”).

Fact witnesses on both sides similarly acknowledge this core distinction between interactive and statutory services. *See, e.g.,* Pittman WDT ¶ 13 (“Based on my long history in

the music industry, I believe that interactive services and Internet radio services like iHeartRadio serve very different roles for both consumers and labels . . .”); Kooker WDT at 15 (noting the “fundamental distinction — between statutory services mirroring terrestrial radio and directly licensed services enabling customized music access”); Harrison WDT ¶ 9 (“These services provide materially different types of access to musical content. A number of these services are ‘on-demand,’ meaning that, among other features offered, the service allows users (or subscribers) to choose the immediate next song that they will hear and create playlists of songs in the exact order in which they want to listen to them. . . . Other such services offer programmed, customized, or personalized webcasting.”); Tr. at 810:21-811:6, 812:6-22 (Hair) (acknowledging that noninteractive services are meaningfully distinct from on-demand services because “it’s frustrating” when he “want[s] to hear” particular artists or songs but “I’m not able to do that on Pandora,” and that on-demand services are “more valuable” than noninteractive services).

Professor McFadden, one of SoundExchange’s survey experts, performed a conjoint analysis that found that on-demand functionality — including the ability to switch from one song to another at any point (*i.e.*, unlimited skips) and the ability to play music offline — is valued by consumers at approximately \$4.23 per month, or more than \$50 per year. *See* McFadden WDT ¶¶ 9, 58, 61-62 & Tables 5, 7. To put this in perspective, even the most engaged category of music consumers [REDACTED]

[REDACTED]. Thus, according to Professor McFadden, the value to consumers of being able to access all the music they want, when and how they want, is theoretically greater than what all but a small fraction of U.S. consumers are willing to spend in

total on music; this assertion undermines the usefulness of his survey as applied to the real world. *See* Tr. at 874:20-875:10 (McFadden) (admitting that to determine “willingness of a consumer to pay” for features that the survey “omits a feature you need . . . and that’s the baseline value of having a streaming service available at all”). And, Professor McFadden’s analysis is fundamentally flawed in ways that likely understate the true value that consumers place on interactive services. *See* IHM FoF ¶¶ 318-23; IHM Response FoF ¶ 412.

Professor Rubinfeld likewise agreed that consumers value interactive services more highly than statutory services, and that it was therefore necessary to “[a]djust[] for the value of ‘interactivity’” before agreements with interactive services could be used as a benchmark. Rubinfeld WDT ¶¶ 207-211. He performed an analysis of “current market prices” of interactive and statutory services, and he found that interactive services were twice as valuable to consumers as statutory services. *Id.* ¶ 207 & Ex. 5. Professor Rubinfeld estimated this gap at approximately \$5 per month, or \$60 per year. *See id.* Moreover, Professor Rubinfeld underestimates the difference in value consumers place on interactive and statutory services. *See* IHM FoF ¶¶ 276-298, 311-316. Furthermore, using the revenues that interactive and statutory services actually earn — rather than retail subscription prices (an approach that fails properly to account for consumers who use free, ad-supported services) — Professors Fischel and Lichtman demonstrate that the value of interactivity is more than [REDACTED] greater than Professor Rubinfeld finds under his flawed approach. *See* Fischel/Lichtman WRT ¶ 58; *see also* IHM FoF ¶¶ 324-327.

258-268. These paragraphs summarize evidence that interactive services have added playlists and other features that mirror features on statutory services, which SoundExchange argues is evidence that the line between statutory and interactive webcasting is blurring. But the addition of such features to interactive services does not change the fact that a consumer who

wants a service with on-demand functionality can receive that only from an interactive service, not from a statutory service. Thus, as Professor Lichtman explained, whatever marginal similarities interactive and statutory services may have, a very large gap between the two services still remains:

[I]f you really wanted to say there's been convergence, that Spotify looks a lot like Pandora, you have to say they've stopped on-demand. That's the key thing that makes the services different, not the little features that have been added, but the big feature that's always been there years ago and still today. So if you frame convergence and say, look at the things that have been added, you miss the most important thing that shows, hey, these really are different services.

Tr. at 3998:11-21 (Lichtman); *see also* Tr. 3999:17-4000:2 (Lichtman) (“[Judge Strickler]:

“Would I be correct in understanding your testimony in saying, sure — in rebutting Dr.

Rubinfeld, sure we've seen movements along that linear line, that kind of . . . analysis, but

there's still this huge gap because the fundamental points on each end are different, in one place

you pick your music, in one place you still can't. So you might have closed the gap but the gap

is still enormous. [Prof. Lichtman]: Right. There's a big [gap], still, between those two,

exactly.”).

269. This paragraph cites an internal iHeartMedia document that SoundExchange claims is evidence of statutory services becoming more like interactive services. But none of the supposedly lean-forward features that iHeartRadio and other statutory services have added come close to the on-demand functionality available on interactive services. *See* IHM Response FoF

¶¶ 257-268. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. With respect to other allegations in this paragraph involving Pandora, iHeartMedia refers the Judges to Pandora's response.

270. This paragraph asserts that "in 2009, iHeart began featuring on-demand video content." But this on-demand *video* content is an adjunct capability that represents very minor elements of total listenership for iHeartMedia's service, and provides no basis to conclude that statutory services are becoming more like interactive services in any meaningful way. *See* Fischel/Lichtman WRT ¶ 11 n.14. With respect to other allegations in this paragraph involving Pandora and Sirius XM, iHeartMedia refers the Judges to those parties' responses.

271-273. These paragraphs describe how statutory services may incorporate user feedback to provide more personalized curation. But many listeners never use these personalized features. *See* Tr. at 6134:8-9 (Fleming-Wood) (stating "almost 50 percent" of Pandora's users do not use the thumbs up/down feature). And even when a consumer extensively uses the thumbs up/down feature, algorithm-based curation does not effectively replicate the experience of an interactive service or make it more likely for consumers to view statutory and interactive services as close substitutes. *See* IHM Response FoF ¶¶ 257-268.

274. This paragraph asserts that iHeartRadio offers "personalized stations that approximate on-demand functionality." But none of the support that SoundExchange cites addresses the critical question of how consumers view these services, and in any case SoundExchange has mischaracterized these sources. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Mr. Pittman's testimony thus makes clear that when he previously used the term [REDACTED] to describe Pandora he had a different conception of that term from the one SoundExchange urges. The one iHeartMedia document that SoundExchange cites confirms this. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

275-276. These paragraphs assert that a user of iHeartRadio "is very likely to hear the *exact* song or songs he or she had in mind within minutes of starting the station." This assertion is incredulous on its face, and SoundExchange's sole support — Mr. Kooker's "natural experiment" — was discredited at the hearing. This experiment consisted of Mr. Kooker using the search function of iHeartRadio to find radio stations that were playing a single song, Meghan Trainor's "All About That Bass," which happened to be one of the biggest hits in the U.S. at the time. At the hearing, however, Mr. Kooker was unable to replicate this experiment to find individual songs, including the hit singles of Meghan Trainor that he previously had claimed to have found. *See* Tr. at 6629:3-6644:1 (Kooker). The simulcast feature that Mr. Kooker claimed "closely resembled" an interactive service not only fell far short in terms of providing comparable on-demand access, but Mr. Kooker also conceded that he was aware of no data

indicating that consumers were actually using this search functionality, much less in the same way Mr. Kooker did for his pre-filed testimony. *See* Tr. at 6639:14-21 (Kooker) (“Q. While we’re waiting for this to play, Mr. Kooker, I just want to ask you whether you have any basis to believe that there’s any users in the real world that use iHeartRadio’s simulcast service in the way that you describe in your written rebuttal testimony? A. I don’t know whether they do or not, but I know they have the possibility to do it.”).

277. iHeartMedia refers the Judges to Sirius XM’s response.

278. This paragraph consists of lawyer argument that is wrong for the reasons discussed above. It also contains a quote from Pandora’s founder; iHeartMedia refers the Judges to Pandora’s response.

279-285. These paragraphs argue that the degree of interactivity on statutory services is “constantly evolving,” and that consumers increasingly demand greater control, citing mostly Pandora documents and testimony. SoundExchange does not quantify this supposed increased demand, however, and the record shows that approximately 80 percent of music consumption takes place via a lean-back radio-like experience. *See, e.g.*, Herring WRT ¶ 9 & Figure 2 (showing 76.3 percent of consumers are listening to lean-back services); Tr. at 4478:15-4479:16 (Shapiro) (Terrestrial radio “is basically half of the market.”); Shapiro WRT Figure 2 (showing other forms of radio-like listening (*e.g.*, “satellite radio,” “webcasting”) constitute another 20+ percent); Fleming-Wood WDT ¶ 14 n.2; Tr. at 6138:2-23 (Fleming-Wood); Tr. at 3397:11-3399:6 (Herring). Moreover, even if it were the case that a greater percentage of consumers would prefer services that offer more control over music selections, statutory services cannot come close to matching interactive services, which allows consumers to

listen to any song within the service's library, at any time, without limitation, on any device. *See* IHM Response FoF ¶¶ 257-268.

286-287. These paragraphs describe an internal iHeartMedia email regarding

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. There is no evidence linking this email

to the First Amendment to the iHeart-Warner agreement, which SoundExchange mischaracterizes in any event. [REDACTED]

[REDACTED]

[REDACTED].

288-289. These paragraphs describe an email exchange between Mr. Cutler and Tres Williams of iHeartMedia, which was forwarded to Warner during the negotiations of the iHeartMedia-Warner deal. [REDACTED]

[REDACTED]

[REDACTED].

290. This paragraph claims that simulcast services are also becoming more like interactive services. SoundExchange again cites Mr. Kooker's testimony, as well as Mr. Dimick's testimony regarding the TuneIn simulcasting service. As described above, the searching capability on simulcast services does not come close to matching the on-demand

functionality of interactive services, and is hardly evidence that consumers view simulcast and interactive services as substitutes. *See* IHM Response FoF ¶¶ 275-276. The record evidence shows that statutory webcasting siphons listeners from terrestrial radio, not interactive services.

See IHM FoF ¶¶ 301-302; [REDACTED]

[REDACTED]; Herring WRT ¶ 11 (describing consumer survey showing “that if free online music services were no longer available, most consumers would revert to broadcast radio, watch music videos or listen to music on YouTube or Vevo, or simply listen to less music, as opposed to subscribing to a lean-in service; and that time spent listening to online, noninteractive services is mostly replacing time spent listening to broadcast radio or is new time that would not have been spent listening to any music at all — almost none of it is taken from listening to lean-in services like Spotify.”); Rosin WRT at Figures 11-12 (time that 46 percent of active users spend listening to noninteractive services is mostly new listening time not taken from other sources of audio listening; only 1-2 percent of active users report that time spent listening to noninteractive services is replacing time spent listening to on-demand services).

291. This paragraph attempts to distinguish simulcast and terrestrial radio by arguing that simulcast services are not geographically bound. But the mere fact that these services are widely available does not suggest that consumers will start using them interchangeably with interactive services, and all evidence is to the contrary. *See* IHM Response FoF ¶¶ 257-268. As Professor Rubinfeld conceded, the ability to access a service more broadly does not enhance a “user’s ability to select a particular song for listening at the time he or she wants to listen to it.”

Tr. at 2304:22-2305:2 (Rubinfeld); *see also* Tr. at 432:16-433:14 (Kooker) (making same concession). The market evidence from the iHeartMedia-Warner agreement and the 27 iHeartMedia agreements with independent labels shows that [REDACTED]

[REDACTED]. *See* IHM FoF ¶¶ 342-345.

292-294. These paragraphs argue that the greater availability of broadband and mobile technologies “reinforce[s] convergence” between statutory and interactive services. As demonstrated above, however, the mere fact that more consumers can use webcasting services has no bearing on whether consumers will, in fact, start using statutory and interactive services interchangeably, and all evidence is to the contrary. *See* IHM Response FoF ¶¶ 257-268.

295. This paragraph argues that simulcast and terrestrial do not compete for listeners, but none of the cited sources support that claim. [REDACTED]

[REDACTED]

[REDACTED]

Professor Shapiro also does not endorse SoundExchange's view, but the opposite. Two lines above the testimony that SoundExchange cites, he asserts that there "is *really strong substitution* from terrestrial radio to Pandora." Tr. at 4484:11-12 (Shapiro) (emphasis added). As a matter of basic economics, the fact that substitution does not typically work "the other way" does not mean the two do not compete. *See* Tr. at 4484:17 (Shapiro). As with many forms of intermodal competition, such as the transition from the horse-and-buggies to cars, substitution and resulting competition often works principally in one direction.

296. This paragraph consists of lawyer argument, which is wrong for the reasons described above. It also claims that the [REDACTED] nature of webcasting consumers increases competition between statutory and interactive services, but the sources it cites merely state that [REDACTED]

[REDACTED]. *See* [REDACTED]
[REDACTED]; Tr. at 3462:2-8 (Herring). This does not establish that statutory services can satisfy demand for both lean-back and lean-forward features, or that consumers are using statutory services as substitutes for interactive services, which is contrary to the evidence. *See* IHM FoF ¶¶ 28, 300-302.

297-301. These paragraphs argue that internal documents from iHeartMedia and the other services [REDACTED]. But the iHeartMedia documents that SoundExchange cites in no way support that view. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; and, in any case, the mere fact that iHeartMedia [REDACTED]

The other two documents that SoundExchange cites [REDACTED]

[REDACTED], contain no information that is relevant to whether [REDACTED]

[REDACTED]. iHeartMedia refers the Judges to Pandora's and Sirius XM's responses with respect to the other cited material in these paragraphs.

302. This paragraph consists of lawyer argument that "[t]he [o]nly [d]ividing [l]ine" between interactive and statutory services "[i]s [t]he [s]tatutory [l]icense." As demonstrated above, however, this is simply incorrect. There is extensive evidence of distinct consumer demand for statutory and interactive services, and no contrary evidence that consumers would view these services as substitutes even absent the statutory license. *See* IHM Response FoF ¶¶ 257-68. The testimony of record label lawyers regarding how they would approach negotiations with statutory services absent the statutory license has no bearing on the actual differences between these services in the actual marketplace.

303-306. iHeartMedia refers the Judges to Pandora's response.

307. This paragraph suggests that iHeartMedia is purposely steering consumers away from paid subscriptions by promoting "ad-free, uninterrupted listening on its custom stations" and not offering any premium subscription option. But the fact that iHeartMedia's custom service contains only visual (not audio) ads and does not contain a premium subscription option does not demonstrate convergence, but the opposite. Most interactive services offer either free tiers with ads

or paid tiers without ads. iHeartRadio's custom service contains no audio ad or paid subscription option, thereby distinguishing it from interactive services like Spotify.

308. This paragraph consists of lawyer argument, not proposed findings. Moreover, SoundExchange offers no evidence that the labels would or could demand similar terms for statutory services as it does for interactive services, and there is extensive evidence to suggest that they could not given the distinct consumer demand for these services. *See* IHM Response FoF ¶ 254.

309. This paragraph argues that the "freemium" model used with interactive services helps convert subscribers to paid subscriptions. But even assuming that were true, it is inapplicable to statutory services, for which there is no evidence that meaningful numbers of consumers would be willing to pay. As noted above, for example, only 4 percent of Pandora subscribers are paid subscribers. *See* IHM Response FoF ¶ 254. In any event, the evidence suggests that SoundExchange has it backwards, and that the freemium model thwarts rather than promotes paid subscription. *See* IHM Response FoF ¶ 255.

310. This paragraph cites only Mr. Kooker for the proposition that "[d]irect licensees find themselves competing for listeners with closely comparable services" that pay lower rates. Kooker WDT at 17. Mr. Kooker provides no support or citation for this statement, and he is not a reliable source for how direct licensees perceive their competition. There is, in fact, no record evidence of such competition for listeners, and extensive contrary evidence indicating that listeners do not perceive interactive and statutory services as substitutes. *See* IHM Response FoF ¶¶ 257-268.

311. This paragraph asserts that, absent a statutory license, record labels would insist on [REDACTED] in licenses with noninteractive services, [REDACTED]. But the speculative testimony of record label executives that they would treat

noninteractive and interactive services the same in negotiations cannot be credited, given the overwhelming evidence that demand for these two services is fundamentally different. As described above, the evidence demonstrates that consumers are simply unwilling to pay for statutory services even to the same limited extent that they pay for interactive services, and therefore there is no basis to believe that the record labels would pursue a fruitless strategy that treats consumers of these two different types of services the same. *See* IHM Response FoF ¶ 254.

312. This paragraph consists of legal argument, not proposed findings. For the reasons set forth in paragraphs 25 and 26 of iHeartMedia’s Proposed Conclusions of Law, SoundExchange is incorrect that the hypothetical willing buyer should include companies with unique advantages, like Apple or Google, who are entirely indifferent to the profit they may earn from webcasting due to their other lines of business.

313. This paragraph consists entirely of lawyer summation, not proposed findings of fact. Moreover, Soundexchange is wrong that, “[a]s a matter of economic common sense,” record labels would not agree to lower rates for statutory services than for interactive services. The evidence shows that record labels have so agreed, for economic reasons. *See* IHM FoF Part II.D. By contrast, in a marketplace in which there is limited consumer willingness to pay for listening to music, it would make no sense for copyright owners to demand payment through a paid subscription model, as opposed to tried-and-true ad-supported models.

RESPONSE TO PART VI – SOUNDEXCHANGE’S RATE PROPOSAL

314-319. These paragraphs simply describe SoundExchange’s rate proposal. No response is required.

RESPONSE TO PART VII – SOUNDEXCHANGE’S USE OF INTERACTIVE AGREEMENTS AS BENCHMARKS

320. This paragraph is introductory and cites no evidence. As discussed below, SoundExchange’s broad claim that “any contract” between willing buyers and willing sellers “would base royalties on a greater-of formula” fails to account for the evidence that direct licenses with simulcast services [REDACTED].

321-322. These paragraphs cite testimony regarding only contracts between interactive services and record labels. SoundExchange ignores that [REDACTED]. *See* IHM FoF ¶ 341. A “greater of” structure containing a percent-of-revenue prong would be inappropriate for simulcast services because simulcast services, unlike custom services, earn a portion of their revenue from valuable, non-music content, and therefore SoundExchange’s percent-of-revenue proposal could not be applied to all of a simulcaster’s revenues, as Professor Rubinfeld himself conceded. *See id.* ¶¶ 346-348.

323. This paragraph refers only to contracts between interactive services and record labels. The evidence shows that a “catch all” revenue definition is unmanageably overbroad and would lead to intractable disputes if applied to statutory services, and it is inconsistent [REDACTED]. *See id.* ¶¶ 435-440.

324. SoundExchange cites no evidence to support its assertion that “[g]reater-of-structures with percentage of revenue shares” are found in license agreements for noninteractive services. [REDACTED]. *See id.* ¶ 341.

325. SoundExchange cites no evidence to support the claims in this paragraph.

326. The provisions of the Apple iTunes Radio agreements cited in this paragraph do not reflect a “greater-of compensation formula,” as SoundExchange claims, but rather reflect [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]; *see also* IHM Response FoF ¶ 430 (iTunes Radio service is not DMCA-compliant).

327. In describing the iHeartMedia-Warner Agreement, SoundExchange ignores evidence that the [REDACTED] provision ([REDACTED]) appeared in the contract only because [REDACTED]

[REDACTED]. *See* IHM FoF ¶ 212. [REDACTED]
[REDACTED]
[REDACTED]. *See id.* ¶¶ 211-212,

331. Although SoundExchange now asserts that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

328. The 27 agreements cited in this paragraph do not contain a [REDACTED]
[REDACTED]
[REDACTED]
than SoundExchange’s proposed 55 percent of revenue figure and [REDACTED],

see, e.g., id. ¶ 4(a); IHM FoF ¶¶ 331, 439. Moreover, SoundExchange does not even assert that anyone thought that [REDACTED]

[REDACTED]. As Professor Lichtman testified, the evidence shows that the “greater of” [REDACTED] in these and other agreements applicable only to noninteractive custom broadcasts was set so high that no party expected it would ever be triggered, and that the prong was included merely to influence the statutory rate-making proceeding. *See* Tr. at 4016:14-4017:25 (Lichtman).

329-330. SoundExchange cites [REDACTED] in label agreements for the Nokia MixRadio and Rhapsody unRadio services. As iHeartMedia has shown, however, neither of these services is DMCA-compliant, and therefore they are not “noninteractive services,” as SoundExchange claims. *See, e.g.,* IHM FoF ¶¶ 315, 399, 412-413, 416. The Judges should rely on the 29 agreements in the record that come directly from the noninteractive market, not out-of-market agreements like those for Nokia MixRadio and Rhapsody unRadio that must be adjusted in several ways. *See* IHM CoL ¶¶ 10-14; IHM FoF ¶¶ 263-264, 289-298. Furthermore, [REDACTED]

[REDACTED]

[REDACTED]. *See* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

331. The fact that the Pandora-Merlin Agreement contains a [REDACTED] [REDACTED] undermines SoundExchange’s proposal that the Judges adopt a [REDACTED] [REDACTED] for the statutory license. *See* IHM FoF ¶ 331. Additionally, SoundExchange selectively

cites to portions of Charlie Lexton's testimony to claim that Merlin believed [REDACTED]

[REDACTED]. Hearing testimony [REDACTED]

332-340. There is no evidence to support SoundExchange's claims that a greater-of structure is either beneficial to licensees or economically efficient. Although Professor Rubinfeld testified that *licensors* could receive economic benefits from a greater-of structure, *see* Tr. at 1756:21-1757:3 (Rubinfeld) (explaining how structure provides "minimum compensation" to record labels and entitles labels to "share [revenues] if the service happens to be successful"), SoundExchange cites no economic principle or real-world example to support its claim that a greater-of structure "allows the minimum per-play rate to be reduced." Moreover, as set forth above, the evidence shows that the real reason why the greater-of structure was included in agreements for custom noninteractive broadcasts was to influence the statutory rate-making, not because any parties thought that it was likely to be triggered. *See* IHM Response FoF ¶ 328.

SoundExchange likewise cites no economic or empirical evidence to support its claims that a greater-of structure has "positive economic efficiencies," or that omitting such a structure "could create distortions in the marketplace," other than the unsupported assertions of Professors Rubinfeld and Lys. *See* Tr. at 1757:4-9 (Rubinfeld); Lys WDT ¶¶ 68-69. Furthermore, omitting "per-subscriber or per-user minimum fee" and "an overall minimum compensation guarantee" from a rate proposal for noninteractive services is not "inherently conservative" because, as Professor Rubinfeld acknowledged, such terms "are not generally applicable to statutory services." Rubinfeld WDT ¶ 97. A purported "inherent risk asymmetry" is also no basis to

impose a greater-of structure because the evidence shows that licensing to noninteractive services provides substantial promotional *benefits* to record labels, not “risks.” *See* IHM FoF Part II.

The evidence shows that webcasting services face greater economic risks than the record labels, as demonstrated by the relative profitability of the two industries and the widespread failures in the webcasting industry. *See* IHM FoF ¶¶ 33-54 (describing economic risks to webcasting services). And, although Professor Rubinfeld opined that a greater-of structure “creates a form of potentially beneficial price discrimination,” Rubinfeld WDT ¶ 112, SoundExchange states that streaming services all face high price elasticity, *see, e.g.*, SX FoF ¶¶ 446-447, 455, undermining the notion that heterogeneous consumer price elasticities are likely to give rise to “beneficial price discrimination.”

341-345. Professor Rubinfeld’s assertion that SoundExchange’s proposed per-play rates would need to be *even higher* absent a percent-of-revenue prong finds no evidentiary support and highlights the glaring disconnect between his interactive benchmark and the economic evidence from the noninteractive market. The per-play rates proposed by SoundExchange are nearly double the per-play rate currently being paid by services accounting for approximately 80 percent of the webcasting market, despite the undisputed fact that no standalone webcaster has ever been profitable, even at those lower rates. *See* IHM FoF ¶¶ 39-44. Likewise, SoundExchange’s comparison to the difference between “stated per-play rates” and “effective per-play rates” for *interactive* services is irrelevant because SoundExchange cites no evidence that any *noninteractive* service pays, or is even likely to pay, royalties [REDACTED], undermining any suggestion that per-play rates would need to be adjusted in the absence of a greater-of structure. *See* [REDACTED]

346-348. Although the Judges used interactive service agreements as benchmarks in *Webcasting II* and *Webcasting III*, that was because the Judges were not presented with a single noninteractive service agreement in those proceedings. See IHM FoF ¶¶ 2-4; IHM CoL ¶¶ 10-14. In both proceedings, the Judges recognized the need to perform numerous adjustments to interactive agreements to render them even potentially probative,² and in *Webcasting III* the Judges observed numerous flaws in how SoundExchange's expert, Dr. Pelcovits, had attempted to perform these myriad adjustments.³ The same is true here, as SoundExchange still fails to address many of the Judges' concerns about the interactive benchmark. For example, in the *Webcasting III Remand*, the Judges criticized the interactive benchmark for overemphasizing subscription revenue and ignoring advertising revenue,⁴ yet Professor Rubinfeld "does not explicitly account for 'free' ad-supported services" in his analysis, see Rubinfeld WDT ¶ 170. Professor Rubinfeld's analysis also does not (a) adjust for the downward trend in interactive royalty rates, see IHM FoF ¶¶ 313-314, or (b) incorporate independent label contracts, see IHM

² See, e.g., *Webcasting III Remand*, 79 Fed. Reg. at 23115 (noting need for "certain significant adjustments" to interactive benchmark); *Webcasting II*, 72 Fed. Reg. at 24095 (observing "the relative difference between the benchmark [interactive] market and the hypothetical target market would necessitate an adjustment").

³ See *Webcasting III Remand*, 79 Fed. Reg. at 23118-19; see also Fischel/Lichtman WDT ¶¶ 113-119 (discussing flaws in Dr. Pelcovits' analysis).

⁴ See *Webcasting III Remand*, 79 Fed. Reg. at 23118.

Response FoF ¶¶ 363-364, both of which the Judges previously found “compromised” and “diminishe[d] the value of” SoundExchange’s interactive benchmark.⁵ In this proceeding, by contrast to *Webcasting II* and *Webcasting III*, the Judges have much better evidence, consisting of 29 “recent licensing agreements negotiated between important noninteractive webcasters and various copyright holders, large and small.” Fischel/Lichtman WDT ¶ 16. In light of this better evidence, reliance on interactive agreements from a different market would be less appropriate, not more appropriate.

349-357. To the extent SoundExchange points to interactive services offering “noninteractive, ‘lean-back’ functionality,” that does not change the reality that DMCA-compliant services are fundamentally different from interactive services, and therefore interactive-service agreements require several complicated adjustments to translate them to the market for DMCA-compliant services. *See* IHM FoF ¶¶ 299-310; IHM Response FoF ¶¶ 257-301; *see also* Tr. at 3997:18-3999:9 (Lichtman) (“on-demand,” which has “always been there” is “the most important thing that shows, hey, these really are different services”). As iHeartMedia has shown, Professor Rubinfeld’s attempts to make these adjustments are flawed and incomplete. *See* IHM FoF ¶¶ 266-298, 311-316.

358-360. SoundExchange’s rate proposal is, as Professor Rubinfeld testified, based on only 26 interactive service agreements, fewer than the 29 in-market agreements on which iHeartMedia bases its rate proposal. *See* IHM FoF ¶ 268; Tr. at 6313:5-6315:16 (Rubinfeld); Rubinfeld WDT ¶¶ 227-228 (“adjusted minimum per-play rates computed” in Exhibit 16a was basis for benchmark rates); Rubinfeld WDT Exhibit 16a (SX Ex. 59) ([REDACTED])

⁵ *See id.*

that support iHeartMedia’s rate proposal reflect a significant portion of the noninteractive market, including webcasting services responsible for approximately [REDACTED] of SoundExchange’s statutory webcasting revenues, *see* IHM FoF ¶ 10, and thousands of record labels that provide a substantial cross-section of the music industry and who collectively represent a significant share of the market — including a major record label (Warner), the largest label collective that is considered the “fourth major” (Merlin), and large and important independent labels like Big Machine, *see* IHM Response FoF ¶ 371; IHM FoF ¶ 222.

361. SoundExchange relies on Professor Talley’s theory-based testimony to assert that the statutory license “crowds out” unobserved agreements that would have been negotiated at higher rates, resulting in a “downward bias” among observable negotiated agreements. But Professor Talley’s theoretical conclusions are unreliable because, as he admitted, he “did not try to calibrate [his] model with market data.” Tr. at 6098:12-15 (Talley); *see also* Tr. at 6031:11-6032:23 (Talley) (acknowledging that “discovery dealing with the actors who are actually involved in this proceeding” would be “a helpful piece of information” in “mov[ing] from the theoretical to the practical”). And, his key assumptions run counter to the facts. For example, he assumes a statutory rate significantly below the services’ average willingness to pay, *see* Talley WRT at 41 n.74, 50, even though the evidence shows that the statutory rate is actually at or above the upper bound of standalone webcasters’ ability to pay, *see* IHM FoF ¶¶ 34-44 (webcasters unable to be profitable at current rates). The significant amount of negotiation among willing buyers and willing sellers in the noninteractive marketplace that has resulted in lower negotiated royalty rates confirms that statutory rates are “too high,” as Professor Rubinfeld acknowledged. *See* Rubinfeld WDT ¶¶ 90, 143; Rubinfeld WRT ¶¶ 206, 214.

362. Insofar as SoundExchange is asserting that iHeartMedia's rate proposal relies on a "single agreement," SoundExchange is wrong. iHeartMedia's rate proposal is supported by, among other things: an agreement with a major record label (Warner); agreements with 27 independent labels, including sophisticated labels that represent some of today's most popular artists; and the Pandora-Merlin agreement, which some 15,000 Merlin members have voluntarily signed. *See, e.g.,* IHM FoF ¶ 169.

363-368. As Professor Rubinfeld conceded on cross-examination, his rate proposal is based on only 26 agreements, which are between 4 major labels and 10 interactive services — not a "vast array" of 80 agreements and 13 services, as SoundExchange asserts. *See* IHM FoF ¶ 268; *see also* SX FoF ¶ 366 (calculated "adjusted minimum per-play rates from 26 agreements"); *id.* ¶ 376 (Google Play, Rara, and Sony Music Unlimited "not included in Prof. Rubinfeld's benchmark calculation").⁶ Although Professor Rubinfeld may have *looked at* agreements between independent labels and interactive services, the 26 agreements on which his rate proposal was based were only between major labels and interactive services. *See* Rubinfeld WDT ¶ 228 (rate proposal "based upon . . . adjusted minimum per-play rates"); Rubinfeld WDT Exhibit 16a (SX Ex. 59) (calculating "Adjusted Minimum Per Play Rate" for 26 agreements). As the Judges have said, this failure to incorporate independent-label contracts "diminishes the value of [his] interactive benchmark analysis."⁷ Likewise, although Professor Rubinfeld may have looked at agreements for free tiers, he admits that his "analysis does not explicitly account

⁶ To the extent these 26 agreements reflect a "wide range of prices," that fact would undermine Professor Rubinfeld's key assumption that the ratio of subscription prices to royalty rates is approximately the same in the interactive and noninteractive markets. *See* IHM FoF ¶¶ 278-280.

⁷ *Webcasting III Remand*, 79 Fed. Reg. at 23118.

for ‘free’ ad-supported services,” Rubinfeld WDT ¶ 170, and he believes agreements for free tiers “should be accorded relatively low weight in the set of potential benchmarks,” *id.* ¶ 175. The Services’ proposed benchmarks, by contrast, encompass both free and subscription tiers, *see* Pandora FoF ¶¶ 110-111 (Pandora-Merlin agreement applies to subscription performances), even though noninteractive services are overwhelmingly free-to-the-user, *see, e.g.,* IHM FoF ¶ 282 (“[S]ubscribers constitute only four percent of Pandora’s listenership and zero percent of iHeartMedia’s.”).

369. In criticizing iHeartMedia’s reliance on its 27 agreements with independent labels, SoundExchange cites only the pre-filed rebuttal testimony of Professor Rubinfeld. But, Professor Rubinfeld never even reviewed those agreements in formulating his rate proposal. *See* Tr. at 2280:16-25 (Rubinfeld). And, at the hearing, Professor Rubinfeld had difficulty remembering the key terms of those 27 agreements, *see id.* at 6449:16-6451:13 (Rubinfeld), or that those agreements existed at all, *see id.* at 2320:6-2321:25 (Rubinfeld). Professor Rubinfeld’s opinions about those agreements are therefore not reliable and should be rejected.

370. SoundExchange acknowledges that “[d]irectly licensed services . . . are usually contractually bound to pay for [pre-1972] recordings.” SX FoF ¶ 384. Therefore, Concord was far from unique in seeking pre-1972 royalties from iHeartMedia, and such royalties are no basis to diminish or distinguish the iHeart-Concord agreement as a benchmark. Furthermore, although Glenn Barros (CEO of Concord Records) claimed that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

371. The 27 independent record labels that signed licensing agreements with iHeartMedia accounted for approximately [REDACTED] of webcast performances on iHeartRadio as of July 2014. *See* Fischel/Lichtman WDT ¶ 57. That is hardly the “sliver” the Judges in *SDARS II* were referring to, where Sirius XM had signed agreements with just under 0.5 percent of the rights holders to which SoundExchange delivers payments.⁸ Moreover, iHeartMedia’s rate proposal is based not only on the 27 independent label agreements, but also its agreement with Warner ([REDACTED]) [REDACTED], *see* IHM FoF ¶ 178; [REDACTED] [REDACTED]), as well as the Pandora-Merlin Agreement, [REDACTED], and into which some 15,000 Merlin members have opted, *see* IHM FoF ¶ 224. Finally, SoundExchange cites no evidence for its claim that the 26 agreements with interactive services on which Professor Rubinfeld based his rate proposal “capture[] the overwhelming majority of interactive *and* noninteractive performances.”

372. SoundExchange cites no evidence to support the claims in this paragraph.

373. This paragraph contains legal argument, and is wrong in any event. iHeartMedia has explained why the Judges should utilize direct licenses with noninteractive services, rather than interactive services, in cases where both are available. *See* IHM CoL ¶¶ 10-14.

⁸ *SDARS II*, 78 Fed. Reg. 23054, 23063 (Apr. 17, 2013).

374. This paragraph cites no evidence, though it wrongly claims that Professor Rubinfeld derived his rate proposal from agreements with 13 interactive services, even though he ultimately based his rate proposal on agreements with only 10 interactive services, *see* IHM Response FoF ¶ 363; and footnote 5 confirms the fact that Professor Rubinfeld excluded from his benchmark analysis the vast majority of the agreements he “reviewed.”

375-377. These paragraphs summarize Professor Rubinfeld’s methodology for deriving an initial per-play rate for each of the 26 interactive service agreements that formed the basis for his benchmark analysis. This analysis is highly flawed and unreliable for a number of reasons, including that its key assumptions are unfounded, it fails to account for critical differences between the interactive and noninteractive markets, and it is compromised by an improper and unreliable data set. *See generally* IHM FoF Part V.

378. Professor Rubinfeld’s choice to rely on post-deal performance data, rather than the pre-deal expectations of the parties, renders his analysis uninformative and unreliable. *See* IHM CoL Part I; IHM FoF ¶¶ 196-197, 312-314. Furthermore, even if a term is “quantifiable” *ex post*, such quantification does not reflect what a willing buyer and willing seller would, in fact, agree to where the parties themselves did not value it that way *ex ante*. *See, e.g.*, [REDACTED]

[REDACTED]

[REDACTED].

379. Professor Rubinfeld’s “interactivity adjustment,” which was based on retail subscription prices of interactive and noninteractive services, is highly flawed because it makes two key assumptions — (1) the ratio of average subscription price to royalty rates is the same in the interactive and noninteractive markets; and (2) subscription services are an appropriate proxy for ad-supported services — that are contradicted by record evidence. *See* IHM FoF ¶¶ 277-287.

Additionally, in attempting to analogize to the interactive market, Professor Rubinfeld fails to make adjustments for a number of other important differences between interactive and noninteractive services. *See id.* ¶¶ 289-298.

380. Professor Rubinfeld's attempt to use Professor McFadden's conjoint survey to corroborate his interactivity adjustment or render that adjustment "conservative" is improper because Professor McFadden's s conjoint survey was itself deeply flawed and unreliable. *See* IHM Response FoF ¶¶ 412-424; IHM FoF ¶ 319.

381-382. Professor Rubinfeld's application of Professor McFadden's conjoint survey results is likewise flawed because the two services that Professor Rubinfeld modeled in his analysis were not representative of the attributes of real-world interactive and noninteractive services, including services like Pandora. *See* IHM FoF ¶¶ 320-323.

383-386. Professor Rubinfeld's adjustment for royalty-bearing plays is unreliable and unsupported by record evidence. In particular, Professor Rubinfeld inaccurately assumes that interactive services limit the number of skips per hour that are permitted, *see* Rubinfeld WDT ¶ 214 & Ex. 15a (assuming only six skips per hour), even though he acknowledges elsewhere that interactive services generally offer unlimited skips, *see id.* ¶ 158 (stating "directly licensed 'interactive' services often allow unlimited skips"); *id.* Ex. 14 (including "Unlimited Skips" as feature of "On-Demand Premium Service"); [REDACTED]

[REDACTED]. This unwarranted assumption calls into question the reliability of Professor Rubinfeld's royalty-bearing-play adjustment because, as he testified, "interactive services often do not pay for plays that are less than 30 seconds in length," Rubinfeld WDT ¶ 214, and Professor Rubinfeld offers no basis for estimating how many such

royalty-free performances occur on interactive services. *See* IHM FoF ¶ 316. If such royalty-free performances were, on average, greater than 6 per hour or longer than 15 seconds, as Professor Rubinfeld assumes, *see* Rubinfeld WDT Ex. 15a, the royalty-bearing-play adjustment would likewise need to be larger than 1.1, which would reduce the per-play rate applicable for statutory services. *See also* Rubinfeld WDT ¶ 212 (“[I]t is possible that listeners on ‘interactive’ services have different play habits compared to the listeners of statutory services.”).

387-390. iHeartMedia refers the Judges to NAB’s response. However, SoundExchange’s criticism of Professor Katz acknowledges that a failure to account for non-royalty-bearing plays leads to an “erroneous” adjustment, and that criticism applies as well to Professor Rubinfeld’s attempt to adjust for non-royalty-bearing plays. *See* IHM Response FoF ¶¶ 383-386.

391-392. Regardless of whether Professor Rubinfeld’s “indie adjustment” is valid, Professor Rubinfeld only needed to attempt such an adjustment in the first place because his benchmark analysis fails to incorporate any *actual* agreements with independent record labels, including the more than two dozen in-market deals that iHeartMedia has relied upon for its rate proposal. *See* IHM Response FoF ¶ 369.

393-396. iHeartMedia refers the Judges to NAB’s response.

397. All three bases cited by SoundExchange in support of the “adjustment” proposed in this paragraph are invalid and/or unsupported by record evidence. *First*, there is no record evidence to support SoundExchange’s claim of “ever-increasing convergence.” *See* IHM FoF ¶¶ 299-310. *Second*, [REDACTED]

[REDACTED]

[REDACTED]

██████████, *see id.* ¶ 113. Finally, although the Judges adopted a year-over-year rate increase in *Webcasting III*, that structure was not based on the kind of direct market evidence involving statutory service licensing agreements that are available in this proceeding, *see* IHM Response FoF ¶ 346, and therefore the Judges' prior decision is not a basis to impose an increasing rate structure in this proceeding.

398. This paragraph does not explain why a “streaming market that is rapidly changing” would imply escalating rates over the forthcoming statutory period, other than to hypothesize that “a rational record company” would demand such an escalation due to “the risk of what might occur.” This vague theory finds no support in record evidence, and it does not explain why a “rational” music service would not demand a rate *decrease* due to the same “risk,” particularly in light of the substantial evidence that the current rates are too high for statutory services to earn profits. *See* IHM FoF ¶¶ 38-44. And, although SoundExchange cites two agreements containing escalating rate structures, SoundExchange omits others, such as the ██████████ agreement, which do not provide for escalating rates over time. *See* IHM Response FoF ¶ 397.

399. This paragraph summarizes Professor Rubinfeld's rate proposal, which should be rejected for a number of reasons set forth above and in iHeartMedia's Proposed Findings of Fact. *See generally* IHM FoF Part V (explaining why the Judges should reject the benchmark rates proposed by Professor Rubinfeld).

400. Professor Rubinfeld's interactivity adjustment is flawed for a number of reasons. *See generally* IHM FoF Part V. Furthermore, the statements in this paragraph are conclusory and provide no meaningful basis for accepting Professor Rubinfeld's interactivity adjustment. In

particular, even assuming Professor Rubinfeld’s adjustment, based only on subscription prices, is an “apples-to-apples comparison,” it has no meaningful economic relationship to *royalty rates*.

See IHM Response FoF ¶ 379.

401. The portions of the record cited in this paragraph do not establish that alternative methods of adjusting for interactivity “are inaccurate and improper,” do not discuss the use of ARPU to adjust for interactivity, and do not discuss how “differences in business models could mask or distort the value of interactivity.” A more accurate measure of the relative value of interactivity would be to compare average revenue per performance for interactive and noninteractive services. *See* IHM FoF ¶ 285 (demonstrating that such a comparison would yield an interactivity adjustment of ■■■, significantly higher than the 2.0 adjustment utilized by Professor Rubinfeld). This method does not “mix apples and oranges,” as SoundExchange claims, but rather accounts for non-subscription revenues earned by *both* interactive and noninteractive services. *See* Fischel/Lichtman WRT ¶¶ 56-58, 69.

402-403. iHeartMedia refers the Judges to NAB's response.

404. Professor Rubinfeld acknowledges that his assumption about the ratios of subscription prices and royalty rates is not based on any evidence, such as “formal economic analysis,” “quantitative analysis,” or “exact formulas,” *see* Tr. at 2025:14-2026:11 (Rubinfeld), and the available evidence demonstrates that ratios between subscription prices and royalty rates differ significantly, both between interactive and noninteractive services and among interactive services. *See* IHM FoF ¶¶ 278-281.

405.

that does not suggest that the *ratio* between these two figures should be assumed to be the same across interactive and noninteractive services. *See* IHM Response FoF ¶ 404.

406. This paragraph claims that “data” shows a “correlation between consumer subscription prices and licensing rates,” but it does not cite any data regarding “licensing rates.” Rather, SoundExchange cites data regarding interactive subscription prices and the percentage of total interactive service revenues represented by royalties. *See* Rubinfeld WRT Ex. 15 (SX Ex. 143). This is a different ratio (royalties to revenues) than the one about which Professor Rubinfeld makes an assumption (royalty rates to subscription prices), and it does not compare whether this different ratio is “the same in both interactive and noninteractive markets,” which is a key feature of Professor Rubinfeld’s assumption. Rubinfeld WDT ¶ 169.

407. See response to Paragraph 400.

408-409. Comparing average revenue per user (“ARPU”) for ad-supported interactive and noninteractive services to derive an interactivity adjustment is improper because: (a) the resulting ratio () implies that ad-supported services should pay , which is at odds with market data, *see* IHM FoF ¶¶ 284, 287; and (b) using ARPU rather than average revenue per *performance* fails to account for the fact that “people who are on noninteractive services listen to a lot more music than people on interactive services,” Tr. at 3996:10-17 (Lichtman); *see also* IHM FoF ¶¶ 297-298 (evidence showing disparity in intensity of usage between interactive and noninteractive services).

410. See response to Paragraph 348.

411. SoundExchange cites no evidence to support the claims in this paragraph.

412. SoundExchange presents no economic evidence to support the assertion that adding more features to Professor McFadden’s conjoint survey “could have undermined [its]

accuracy and reliability”; and, in any event, Professor McFadden acknowledged that omitting features “that people care about” undermines a conjoint survey’s accuracy and reliability because it fails to “duplicat[e] the market experience,” which “is the bottom line” of a conjoint analysis. Tr. at 914:14-915:12 (McFadden). Professor McFadden admitted that he “certainly intended to include [in his survey] . . . all of the features that the consumers of music streaming services are likely to value.” Tr. at 916:8-12 (McFadden).⁹ Nevertheless, Professor McFadden failed to include high audio quality and social networking functionality as features in his conjoint survey, despite the fact that documents he purportedly relied upon (but admittedly never read) demonstrated that both features are important and valuable to consumers of digital music services. *See, e.g., id.* at 922:2-941:7 (McFadden); Time, *13 Streaming Music Services Compared* at 1 (IHM Ex. 3646) (“maximum streaming quality” is one of four key features “most are looking for when weighing options”); Master’s Thesis, *Willingness to Pay for Music Streaming Systems* at 27 (IHM Ex. 3647) (“The sound quality of the streamed music . . . is found to have a positive influence on [willingness to pay].” (citing empirical study)); *id.* at 38 (one attribute “important in assessing [music streaming system] quality” is “[t]he ability to share music with contacts”); CNET, *Which Music Service Should You Use?* at 4, 7 (IHM Ex. 3645) (describing social networking features of Spotify and Rdio).

⁹ Professor McFadden did not do an adequate job determining the completeness of the features he surveyed. He admitted that he did not talk to any record labels before conducting his survey, and he did not know whether his staff did. *See* Tr. at 940:2-6 (McFadden). He likewise did not review any documents produced by licensee services before conducting his survey and did not know whether his staff did. *See* Tr. at 940:7-13 (McFadden). Indeed, the only basis for his assertion that no important features were left was an interview of nine individuals who took his pretest. Tr. at 920:5-10 (McFadden).

Professor McFadden also failed to include other important and valuable features, such as exclusive content available on webcasting services, again despite the fact that the sources he purportedly relied upon noted that these features were “found to have a positive effect on consumers’ WTP [willingness to pay] for MSS [music streaming systems].” *Willingness to Pay for Music Streaming Systems* at 3 (IHM Ex. 3647); *see also, e.g.*, Tr. at 5408:7-5409:14 (Frear) (testifying “exclusive content . . . differentiates a service in a way that will set the hook, so to speak, in the sail to get people to pay”).

413. SoundExchange cites no evidence in support of its arguments in this paragraph, and so they should be disregarded. Moreover, SoundExchange’s claim that “high audio quality and social networking functionality are features of both interactive and noninteractive streaming services” is misleading and contradicted by record evidence, as set forth below. *See* IHM Response FoF ¶¶ 414-415. Furthermore, the final sentence of this paragraph constitutes improper new analysis that the Judges excluded when SoundExchange attempted to elicit it from Professor Rubinfeld at the hearing. *See* Tr. at 1803:8-1804:8 (Rubinfeld).

414. SoundExchange’s claims about audio quality in this paragraph are misleading and inaccurate. Although the Pandora website describes 192 kilobits per second (kbps) as “[p]remium audio quality,” Tr. at 6192:1-6 (Fleming-Wood), the music trade press calls that “moderate” quality because it is only 60 percent as good as the premium 320 kbps audio quality offered *exclusively* by subscription interactive services like Beats Music, Google Play, and Spotify, *see 13 Streaming Music Services Compared* at 1-2 (IHM Ex. 3646); *see also Willingness to Pay for Music Streaming Systems* at 14 (IHM Ex. 3647) (calling 160 kbps “Medium” sound quality and 320 kbps “High” sound quality). Also, audio streamed at 192 kbps is relatively “premium” for Pandora, which offers that level of audio quality only on its \$4.99/month Pandora

One subscription service, but Pandora offers a much lower level of audio quality (128 kbps) on its free, ad-supported service. *See* Tr. at 6192:1-6 (Fleming-Wood); Rubinfeld WDT ¶ 208 n.125 (quoting Pandora website). Indeed, Professor Rubinfeld emphasized that high-quality audio is a feature that differentiates premium interactive services from free noninteractive services. *See, e.g.,* Rubinfeld WDT ¶ 207 (“Spotify, like most other ‘interactive’ services, charges \$9.99 per month for its paid version, which provides *improved audio quality*, cached downloads, and ad free services on all devices.” (emphasis added)); *id.* ¶ 208b (“Most importantly, upgrading to the paid service provides more incremental benefits to a listener on a service such as Spotify compared to Pandora. . . . Spotify’s premium service provides substantially better audio quality than its free service and *substantially better audio quality than Pandora’s paid service.*” (emphasis added)).

Although in this paragraph SoundExchange cherry-picks iTunes Radio, the only noninteractive service that offers 256 kbps audio quality, that offering is not representative of the overwhelming majority of noninteractive listeners who use free services like iHeartRadio and Pandora that offer significantly lower audio quality (generally 128 kbps). *See* Rubinfeld WDT ¶ 208 n.125 (quoting Pandora website); *13 Streaming Music Services Compared* at 1-2 (IHM Ex. 3646). SoundExchange’s claim that “it would have been impossible” to survey the value of “multiple tiers” of audio quality is unsupported by any record evidence, and is contradicted by Professor McFadden himself, who testified that using varying “levels” for each “attribute” is an essential feature of conjoint analysis. *See* McFadden WDT ¶ 13 (“By changing the levels . . . the researcher can determine the relative importance that consumers place on each of the attributes.”); *id.* ¶ 15 (“[C]onjoint analysis can reveal consumer sensitivity . . . obscured in real supermarket data because there is insufficient variation in . . . attribute levels.”); *id.* ¶ 25 (“The

levels of features” were set “to provide suitable variation in plans to ascertain the values that respondents place on various features.”).

415. SoundExchange’s claims about social networking functionality in this paragraph are also misleading and inaccurate. Although Pandora offers limited social networking functionality (*e.g.*, sharing a station on Facebook), *see* Tr. at 6129:23-6130:6 (Fleming-Wood), the record shows that there are varying levels of social networking functionality, and again interactive services offer the greatest such functionality, including the ability to “follow” and select other users’ music on demand, within the music service itself, *see, e.g., 13 Streaming Music Services Compared* at 4 (IHM Ex. 3646) (comparing “robust social networking features” of Rdio with “conventional social networking options” of Spotify); *Which Music Service Should You Use?* at 10 (IHM Ex. 3645) (noting Rhapsody’s “social elements” are “not as tightly integrated as what you can find in some other services”); *id.* at 4 (“[W]hen I open my Spotify desktop app, more than 50 of my Facebook friends are actively using it.”); *id.* at 7 (On Rdio’s subscription service, “[y]ou can check what’s in ‘heavy rotation,’ both among friends and all Rdio users” and “follow other people and see what kind of music they’re listening to.”); *Willingness to Pay for Music Streaming Systems* at 14 (IHM Ex. 3647) (“[O]ften it is possible to share music with contacts directly within the environment of the [music streaming system].”). Thus, it is not a simple matter of adding “the missing attribute . . . to both sides of the ratio.” Rather, as Professor McFadden testified, a conjoint analysis must incorporate varying *levels* of each attribute — to the extent different levels are offered in the marketplace — to provide enough variation to ascertain respondents’ relative values. *See* McFadden WDT ¶ 25.

416-417. These paragraphs introduce the section that follows and cite no evidence. No response is required. As set forth below, however, SoundExchange's assertions about Professor Hauser's qualitative study are unfounded. *See* IHM Response FoF ¶¶ 418-424.

418-419. Both Professor Hauser and Professor McFadden agree that the goal of conjoint analysis is to discern real-world decision-making. *See* McFadden WDT ¶ 13; Tr. at 5592:2-5 (Hauser). And, as Professor Hauser explained, consumers have varying degrees of familiarity with the features of streaming services. *See* Tr. at 5598:18-22 (Hauser). It does not follow, however, that Professor Hauser's study "demanded a higher level of feature comprehension than consumers have in the real world."

Professor Hauser's study tested whether respondents' comprehension of features was *consistent* — both among respondents and between respondents and Professor McFadden — because substantially diverging interpretations of the same feature renders any conjoint analysis of survey data unreliable. *See, e.g.,* Hauser WRT ¶¶ 42-45; Tr. at 5587:5-16 (Hauser). Also, ongoing consumer use "is extremely important to the revenue models" of streaming services, and therefore Professor McFadden needed to ensure that his survey respondents understood features "at th[e] level that someone would understand *after they had used the service*," not just as they would understand those features by reviewing online marketing materials. Tr. at 5586:11-5587:4 (Hauser) (emphasis added).

To use an example offered by Professor Hauser, if a website advertised a "gold watch," and one wanted to know how much a consumer valued that watch, the consumer would need to understand whether "gold watch" meant "solid gold" or merely "gold-plated" because those two understandings would lead to "very different" valuations. *See* Tr. at 5587:8-16 (Hauser). These potential comprehension pitfalls are precisely why thorough pre-tests — dry-run surveys testing

respondent comprehension before a survey is put “into the field” — are critical to the reliability of a conjoint survey. *See, e.g.*, Tr. at 5568:1-6 (Hauser) (“The rule of thumb is when . . . nobody is confused, that is when you put your survey into the field.”); Hauser WRT ¶¶ 32-33, 46. Professor McFadden’s pre-test (or “pilot survey,” as he called it) was not thorough: He “found problems, attempted corrections, but did not pretest his corrections,” Hauser WRT ¶ 46, and therefore “he did not remove any of the confusion,” Tr. at 5570:18-19 (Hauser). Due to Professor McFadden’s insufficient pre-testing, the feature descriptions in Professor McFadden’s survey were confusing to respondents and failed the aforementioned basic tests of comprehension consistency, thereby rendering his survey data unreliable. *See, e.g.*, Hauser WRT ¶ 98 (noting “32 respondents [60 percent] had wide-ranging interpretations of the meaning [of music tastemakers]”); *id.* ¶ 132 (“[R]espondents completed a vague description of [advertising] with their own varied experiences and expectations.”); *id.* ¶ 134 (noting “considerable heterogeneity in the manner in which respondents interpret features”).

Other evidence, such as the high dropout rate of Professor McFadden’s survey respondents, is consistent with this substantial confusion. *See id.* ¶¶ 11, 56-59; *see also id.* ¶ 10 (“Professor McFadden’s survey relied on complicated feature descriptions that were long, overlapping, and jargon-heavy.”). Indeed, Professor McFadden himself admitted, at least for teenagers taking his survey, that the “high attrition rate among teens is alarming to me as well as to Professor Hauser,” Tr. at 898:7-10 (McFadden), and he had “no scientific basis for knowing whether [this observed attrition] is [an] unusually high attrition rate among teens or not.” Tr. at 899:6-8 (McFadden); Tr. at 899:11-13 (“It’s high enough that I would worry about it. I think Dr. Hauser is right in pointing it out . . .”).

420. This paragraph mischaracterizes Professor Hauser's qualitative study as a "memory test" and improperly relies upon Professor McFadden's late-filed "supplemental" testimony, which is not in evidence and should be stricken for the reasons discussed in iHeartMedia's motion on that subject.¹⁰ Professor Hauser's study was not a "memory test" because no memorization of any kind was required. Rather, "study respondents were allowed to go back to prior pages of the questionnaire," which gave them "the time to literally 're-view' details of the survey, provid[ed] them time to digest the information," and "put[] an emphasis on providing true thoughts rather than on remembering correctly." Hauser WRT ¶ 64; *see* Hauser Qualitative Study Questionnaire at D-1 (IHM Ex. 3128) ("During the discussion, the respondent is allowed to go back to the web survey to review or look up information.").

Interviewers were instructed, however, not to encourage or discourage respondents from going back to look up information, but rather to leave it to respondents' discretion, which replicated the experience of Professor McFadden's survey. *See* Hauser Qualitative Study Questionnaire (IHM Ex. 3128) at D-1; Tr. at 5600:11-14 (Hauser). Furthermore, a review of Professor Hauser's questionnaire shows that his study did not "simply . . . ask[] respondents to repeat what they had seen on a previous screen." Most of Professor Hauser's questions did not require the participants to refer to the text of the survey questions at all. *See, e.g.*, Hauser Qualitative Study Questionnaire (IHM Ex. 3128), at D-2 to D-4, D-8, D-10 ("Is there any additional information or different words or phrases that would help you understand the instructions better?"); *id.* at D-5, D-6, D-9, D-11 ("How easy or difficult did you find this exercise to answer? Why do you say that?"); *id.* at D-6, D-9, D-11 ("How did you go about

¹⁰ *See* iHeartMedia, Inc.'s Motion to Strike SoundExchange, Inc.'s "Supplemental Testimony" of Professor Daniel R. McFadden (June 9, 2015).

making your choices on the prior screens?”). And, for those questions that did refer to specific words or phrases, the words or phrases were embedded in the questions themselves. *See, e.g., id.* at D-6 (“Could you tell me in your own words what the term Playlist Method means to you?”); *see also* Tr. at 5601:9-15 (Hauser) (explaining his “methodology” as “continually probing” and “helping the respondent, as best they can . . . to encourage that respondent in a comfortable manner to describe what they understand”).

421. The trademark cases cited by SoundExchange are irrelevant to the reliability of Professor Hauser’s qualitative study because they involved surveys completely different from Professor Hauser’s study. In the *Starter Corp.* case, the interviewers showed respondents a display of two shoes, but then “[t]he display was . . . covered with a cloth,” and respondents were asked to “identify the names of the shoes” they preferred. *Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 296-97 (2d Cir. 1999). In the *Instant Media* case, respondents were shown a version of Instant Media’s website, which displayed the mark at issue (“I’M”) and Instant Media’s name, and they were then asked what company they believed put out the software bearing the “I’M” mark, which the court observed “is indicative of nothing beyond the survey participant’s ability to remember the I’M mark presented to them at the beginning of the survey.” *Instant Media, Inc. v. Microsoft Corp.*, No. C 07-02639, 2007 WL 2318948, at *14 (N.D. Cal. Aug. 13, 2007). Both surveys were performed for a different purpose than Professor Hauser’s study, using highly superficial methodologies, and both surveys focused solely on what respondents were able to recall, as opposed to probing what they understood. Therefore, neither survey bears any resemblance to Professor Hauser’s qualitative study.

422. Professor Hauser, a leading expert on incentive alignment in consumer surveys, explained that in order for an incentive alignment to be successful, “a respondent must

understand the incentive-alignment instructions, the instructions must be complete on all important elements, and they must reflect how choices are made among real music services.” Hauser WRT ¶ 19. Therefore, Professor Hauser’s qualitative study tested whether respondents misunderstood or misinterpreted the incentive offered to them, which consisted of a combination of a VISA gift card and a gift card to a streaming music service. *See id.* ¶ 70; McFadden WDT ¶ 36. For example, he asked respondents: “If you were presented with these options and had to spend your own money, would you choose the same options?” *See* Hauser Qualitative Study Questionnaire (IHM Ex. 3128) at D-13. Questions like these probed the validity of Professor McFadden’s survey because they tested whether respondents were revealing their true preferences. *See* Hauser WRT ¶¶ 76-78; *see also* McFadden WDT ¶ 36 (“In conjoint surveys, it is important . . . to ensure [respondents] accurately reveal their preferences.”). Likewise, Professor Hauser tested whether respondents understood the language of Professor McFadden’s incentive alignment by asking them what they expected to get for completing the survey and how they believed their choices could impact their compensation. *See* Hauser Qualitative Study Questionnaire (IHM Ex. 3128) at D-2. This only required respondents to describe the basic relationship between the VISA gift card and the streaming music service gift card and relate it to their choices in the survey, Hauser WRT ¶ 85, *not* to “understand the precise mechanics of how an incentive alignment operates,” as SoundExchange claims.¹¹

Professor Hauser’s study showed clear evidence of confusion among respondents regarding the incentive alignment, with only 17 percent of respondents understanding the

¹¹ For example, a respondent was coded as understanding the incentive alignment based on the following response: “Of the \$30 gift, a proportion of that will go towards the plan that it ultimately chooses for you, or that I choose.” Hauser WRT ¶ 85.

incentives in Professor McFadden's survey. *See* Hauser WRT ¶¶ 79-89; Hauser WRT Exhibit 2 (IHM Ex. 3134). Notably, SoundExchange cites no evidence that Professor McFadden's survey respondents understood the incentive alignment, likely because Professor McFadden failed to pre-test his incentive alignment. *See* Hauser WRT ¶¶ 46-52; *see also* McFadden WDT ¶ 41 (describing his "pilot survey").

423. Neither this paragraph nor Paragraph 424 is supported by any evidence. Rather, both rely only on Professor McFadden's untimely "supplemental" testimony, which was never entered into evidence and should be stricken for the reasons discussed in iHeartMedia's motion on that subject.¹² Furthermore, SoundExchange's assertion that participants' self-perception of understanding equates to actual understanding fundamentally misunderstands the purpose of Professor Hauser's study, which was to test *objective* understanding, not subjective understanding. A respondent who displays an objectively incorrect understanding (*e.g.*, $1 + 2 = 7$), but nevertheless feels subjectively confident that he understands correctly, does not actually understand correctly. *See* Hauser WRT ¶ 139 ("[A] respondent who provided a confident, incorrect answer would be classified as 'does not understand.'"). For example, one respondent asked to describe "Available Library Size" responded confidently (but incorrectly) that it means "how much space is available to store your music." *See* Videotaped Interview of Christopher N. (IHM Ex. 3133) at 00:36-1:45. If this person were to then answer a close-out question in Professor Hauser's qualitative study by opining that he did not find the survey confusing, that would not change the fact that he did not, in fact, understand the feature as described or intended by Professor McFadden. For that reason, Professor Hauser explained that the answers to these

¹² *See* iHeartMedia, Inc.'s Motion to Strike SoundExchange, Inc.'s "Supplemental Testimony" of Professor Daniel R. McFadden (June 9, 2015).

remaining close-out questions could only *increase*, not decrease, the amount of observed confusion. *See* Tr. at 5614:11-15, 5633:4-5634:18 (Hauser) (explaining tabulation of additional close-out questions “would have shown additional confusion” and “we sort of didn’t want to pile on”).

424. SoundExchange’s claims in this paragraph are unfounded. Professor Hauser *twice* reported the responses to Question 34 in his written testimony, stating that “seven respondents (13 percent),” including respondents who understood the incentive alignment, “stated that they would not, or would probably not, have chosen the same options” if they were spending their own money. Hauser WRT ¶ 89; *see also id.* ¶ 76 n.82 (same). This figure does not indicate a “robust and effective” incentive alignment, as Professor McFadden’s untimely testimony claims, because the question was “one-sided” and “purposefully biased toward a ‘yes’ answer,” and thus 13 percent of respondents answered “yes” “[d]espite this bias.” Hauser WRT ¶ 89.

425. See responses to Paragraphs 320-321.

426. See responses to Paragraphs 427-430.

427-428. See responses to Paragraphs 329-330.

429. The [REDACTED] cited in this paragraph is not for “Rdio’s free radio service,” but [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

431. [REDACTED]

[REDACTED], and such a broad revenue definition could not feasibly be applied to simulcasting. *See* IHM FoF ¶ 436. Professor Lys’s reliance on individual agreements that “allow for a tailor-made definition of revenue,” cannot be universally applied to all music services over a five-year term, which would need to be true of any aspect of the statutory licensing regime. *See id.* ¶ 440. Furthermore, SoundExchange’s claim that a broad revenue definition would prevent “reshuffling” of revenue is undermined by its other assertion that its rate proposal permits services significant “discretion” to allocate revenue. *See* SX FoF ¶ 439.

433. Pandora broadcasts only music. *See, e.g.*, About Pandora (SX Ex. 2296). Therefore, its agreement with Merlin had no reason to craft a definition of revenue that could apply to all webcasting services, including simulcast services and others that play non-music content. *Cf.* Lys WDT ¶¶ 45-46 (noting “[a] negotiated agreement can be tailored to the specific

business model adopted by a service,” while “[t]he statutory license, however, is not limited to any particular business model”).

434. iHeartMedia refers the Judges to Pandora’s response.

435. SoundExchange’s analogy to a multiple-element sale does not address the reality that its proposed “Fair Method of Allocation” has no basis in generally accepted accounting principles and, lacking any uniform principles, would lead to intractable and costly disputes regarding what is “fair” or “reasonable” in any given circumstances. *See* IHM FoF ¶ 437.

436. iHeartMedia refers the Judges to Pandora’s response.

437. SoundExchange selectively cites testimony from Professor Weil, but ignores testimony from the same colloquy in which Professor Weil made clear that accountants “are never called upon to [allocate revenue] in a fair way,” and he is “confident” that relying on a “Fair Method of Allocation” would leave parties “mired in litigation,” and therefore SoundExchange’s revenue allocation proposal “won’t work.” Tr. at 3955:3-3956:24 (Weil).

438-439. See responses to Paragraphs 435 and 437.

440-441. iHeartMedia refers the Judges to Pandora’s and NAB’s responses.

442-486. iHeartMedia refers the Judges to Pandora’s and NAB’s responses.

However, regardless of how the Judges resolve the question whether § 114(f)(2)(B) requires the Judges to *assume* that the willing buyer and willing seller exist in an effectively competitive hypothetical market, the record here confirms that record labels — the willing buyers in the hypothetical market — do, *in fact*, compete with other record labels for additional spins on statutory services to obtain both incremental revenue and increased promotion. *See* IHM Response CoL Part III; IHM FoF Part III.

487. This is an introductory paragraph to which no response is required.

488-489. See responses to Paragraphs 806-832.

490-493. The iTunes Radio service is not DMCA-compliant, and therefore is not a noninteractive service. *See* IHM FoF ¶¶ 352-355; *see generally* IHM FoF Part VI; IHM Response FoF ¶¶ 939-1014.

494-495. The so-called Section III.E services are not DMCA-compliant, and therefore are not noninteractive services, as SoundExchange claims. *See* IHM FoF ¶¶ 401-416; *see generally* IHM FoF Part VII; IHM Response FoF ¶¶ 1015-1033.

496-499. No record label witness provided any information about any label's finances, let alone information that identified the "recurring fixed costs" SoundExchange claims its rate proposal is designed to cover. *See* IHM Response FoF ¶ 250. Moreover, the ability of record labels to recover any particular level of costs, fixed or otherwise, is not relevant to setting the statutory rate. *See* IHM CoL Part V. That is particularly true where, as here, any reduction in record label revenues has not been caused by webcasting, *see* IHM FoF ¶¶ 79-85, and the record labels' profit margins on digital music are enormous, *see id.* ¶¶ 64-78. Moreover, SoundExchange's own witness conceded that record labels could "certainly dial back [their] fixed costs." Tr. at 6065:15-6068:1 (Talley); *see* IHM Response FoF ¶¶ 175-195.

500. SoundExchange cites no evidence to support the claims in this paragraph, which purports to summarize the preceding discussion.

501-503. SoundExchange cites no evidence to support its assertion in these paragraphs that its rate proposal is "conservative," and the record proves otherwise. The per-play rates SoundExchange proposes are nearly double the per-play rate that services accounting for approximately 80 percent of the webcasting market are currently paying. *See* IHM FoF ¶¶ 10, 39-44. And, SoundExchange's proposal would be an increase over current, much higher,

statutory rates, even though the substantial number of negotiated licensing agreements between labels and statutory services confirms that current statutory rates are “too high.” *See* Rubinfeld WDT ¶¶ 90, 143; Rubinfeld WRT ¶¶ 206, 214. Furthermore, given the evidence of widespread industry failures and financial problems in webcasting, a statutory rate that would substantially *increase* the royalties incurred by webcasters is not financially feasible or sustainable. *See* IHM FoF ¶¶ 33-45, 55-59.

RESPONSE TO PART VIII – PANDORA’S RATE PROPOSAL

504-747. iHeartMedia refers the Judges to Pandora’s response.

RESPONSE TO PART IX – iHEARTMEDIA’S RATE PROPOSAL

748-753. These paragraphs contain a summary of the remainder of Part IX of SoundExchange’s Proposed Findings of Fact. iHeartMedia refers the Judges to iHeartMedia’s responses to paragraphs 754 through 867.

754. [REDACTED]
[REDACTED], but the structure of all of these agreements is the same: in each case, a record label lowered its rates in exchange for a higher volume of plays on iHeartRadio. The fact that Professor Fischel’s analysis shows [REDACTED]
[REDACTED] — earning [REDACTED] per additional play, as opposed to [REDACTED] per additional play — demonstrates only that iHeartMedia’s rate proposal of [REDACTED] per performance is at the high end of the rates supported by the economic evidence. *See also* [REDACTED]
[REDACTED].¹³

¹³ In footnote 23, SoundExchange asserts that Apple’s agreements with Sony and Universal are between a noninteractive webcaster and a major record label. However, Apple is

755. Admitted.

756-759. These paragraphs and footnotes 24 and 25 purport to describe the terms of the iHeartMedia-Warner Agreement and contain a summary of paragraphs 806-832 of SoundExchange's Proposed Findings of Fact. iHeartMedia refers the Judges to Section III.B.1 of iHeartMedia's Proposed Findings of Fact, which sets out the terms of the iHeartMedia-Warner Agreement; iHeartMedia's responses to paragraphs 806-832; and the iHeartMedia-Warner Agreement (SX Ex. 33).

iHeartMedia agrees that Warner entered into the iHeartMedia-Warner Agreement because [REDACTED]. See IHM FoF ¶¶ 191-193; [REDACTED]

[REDACTED]

[REDACTED]

iHeartMedia also agrees that the iHeartMedia-Warner Agreement included [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. See IHM FoF ¶¶ 179-181; Fischel/Lichtman

WDT ¶ 38 & n.34. In the event that Congress were to impose a 2.35 percent royalty on terrestrial radio — as the U.S. Government Accountability Office considered in a 2010 report —

[REDACTED]

[REDACTED]. See U.S. Gov't Accountability Office, GAO-10-826,

not a noninteractive webcaster because iTunes Radio does not qualify as a statutory service. See IHM FoF Part VI.A.

Telecommunications: The Proposed Performance Rights Act Would Result in Additional Costs for Broadcast Radio Stations and Additional Revenue for Record Companies, Musicians, and Performers at 41-42 (August 2010) available at <http://www.gao.gov/assets/310/308569.pdf> (considering rates of from 2.35 to 13 percent and estimating total industry payments, based on those rates, at \$257 million to \$1.3 billion).¹⁴ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. See IHM FoF ¶ 181.

760. SoundExchange acknowledges Professors Fischel's and Lichtman's testimony that the compensation paid for the first "bundle" of plays covered by the iHeartMedia-Warner Agreement was "directly affected by the existing statutory rate," Fischel/Lichtman WDT ¶ 48, but ignores their testimony that the compensation paid for the second "bundle" of additional plays covered by the iHeartMedia-Warner Agreement was "not directly influenced by the existing statutory rate, because absent the agreement, iHeartMedia wouldn't play them and Warner wouldn't receive any compensation for them," *id.* ¶ 48. By focusing their attention on the second "bundle" of additional plays, Professors Fischel and Lichtman are "able to get market data of what market participants thought, uninfluenced by the statutory rate." Tr. at 5317:10-13

¹⁴ [REDACTED]

(Fischel); *see also* IHM FoF Part III (describing Professors Fischel and Lichtman’s incremental analysis, which isolates and removes the shadow of the statutory license from the iHeartMedia-Warner Agreement and iHeartMedia’s agreements with 27 independent labels, as well as the shadow of the Pureplay rates from the Pandora-Merlin Agreement); Fischel/Lichtman WRT ¶¶ 84-88 (similar). In using these agreements as benchmarks, it is unnecessary to make the complicated and highly speculative adjustments that Professor Rubinfeld must use in order to attempt to adjust the rates in interactive service agreements.

761. See response to paragraph 760. SoundExchange fails to acknowledge that iHeartMedia pays the higher NAB rates, not the Pureplay rate, to record labels in the absence of a direct deal. Consequently, in evaluating any deal, iHeartMedia would — and, in fact, did —

[REDACTED]

[REDACTED].

SoundExchange’s suggestion that Warner entered into the iHeartMedia-Warner Agreement in order to encourage iHeartMedia to compete with Pandora and prevent Pandora from taking advantage of the Pureplay rates “to grow unfettered” is not supported by citation to any testimony or evidence. The testimony and evidence SoundExchange cites in this paragraph is unrelated to either Warner’s or iHeartMedia’s views regarding competition with Pandora at the time of the iHeartMedia-Warner Agreement. *See* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; [REDACTED]

[REDACTED]. In any event, such a strategy would be counterproductive: By offering iHeartMedia a lower rate, Warner facilitated more

growth by a service paying a below-CRB rate and did not prevent Pandora from taking advantage of the Pureplay rates.

762. Admitted. For clarity, iHeartMedia paid the NAB rates.

763. SoundExchange quotes selectively from the testimony of Bob Pittman, iHeartMedia's CEO, ignoring his testimony that the compensation formula in the iHeartMedia-Warner Agreement could be replicated across the industry. *See* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. *See* Tr. at 2692:2-25 (Shapiro)

(disagreeing that steering towards the record label that provides the lowest rates is a "first mover" advantage; "steering towards one supplier who gives you a better deal, that's competition, period"). Indeed, the record is replete with evidence that record labels compete on price to get a greater share of the plays on noninteractive services such as iHeartRadio and Pandora, and would do so to a greater extent in the absence of the statutory license. *See* IHM FoF ¶¶ 203, 204; Fischel/Lichtman WRT ¶ 90.

The fact that it is impossible for a single noninteractive service to increase *every* record label's share of plays *at the same time* is precisely what makes deals that incentivize steering — such as the iHeartMedia-Warner Agreement, HeartMedia's 27 agreements with independent record labels, and the Pandora-Merlin Agreement — attractive to record labels. *See* IHM FoF ¶¶ 203, 204; Fischel/Lichtman WRT ¶ 90; Lexton WRT ¶ 36 (“Steering is a particularly important benefit because it cannot be replicated across the market.”).¹⁵

764-765. See response to paragraph 760. There is no evidence to support SoundExchange's assertion that the potential use of direct license agreements in this proceeding has ever taken precedence over business concerns for iHeartMedia. To the contrary, the very testimony from Mr. Cutler that SoundExchange quotes at length debunks SoundExchange's accusation.¹⁶ [REDACTED]

[REDACTED]. Without any evidence to support its accusation, SoundExchange resorts to insinuation based on the timing of iHeartMedia's retention of Professors Fischel and Lichtman. If SoundExchange had asked Professors Fischel and Lichtman at their depositions or at the hearing when they first learned of

¹⁵ Of course, similar deals could still proliferate in any number of ways. One service could make similar deals with a large group of record labels, but less than the full universe of record labels, at roughly the same time (as iHeartMedia has done). Multiple services could make similar deals with some of the same record labels at roughly the same time (as Pandora and iHeartMedia have done). Or, one service could make similar deals with the full universe of record labels at different times (as might happen over time).

¹⁶ [REDACTED]

the iHeartMedia-Warner Agreement and of iHeartMedia's [REDACTED] Case projections, it would have learned that their economic analysis followed, and did not influence, the business deal.

766. Admitted. However, iHeartMedia's proposed rate of \$0.0005 per performance is much less of a departure from the Pureplay rates currently paid by Pandora, which represents approximately three-quarters of the statutory webcasting market. *See* Tr. at 5315:12-8 (Fischel) ("We are focusing on the CRB rate . . . but if you compare our proposal to the existing pureplay rate for non-subscription pureplay performances, the departure is much less."); Blackburn WDT ¶ 23 & Table 2. If anything, it is SoundExchange's proposed rate that is a departure from the existing rates paid in the market, as it would roughly double the rates that Pandora currently pays but that have left it — and every other webcaster — unable to earn a profit. *See* IHM FoF ¶¶ 38-41.

767. SoundExchange quotes selectively from Professor Fischel's testimony, excluding his testimony that he and Professor Lichtman are "confident" that the economic evidence shows that, if unconstrained by government regulation, willing buyers and willing sellers would negotiate royalty rates of approximately \$0.0005 per performance. Tr. at 5314:21 (Fischel); Fischel/Lichtman WDT ¶ 11.

768. SoundExchange ignores or misunderstands Professors Fischel and Lichtman's incremental analysis of 29 agreements, which requires the plays covered by each deal to be divided into two "bundles" — plays that would have occurred in the absence of the deal and additional plays that would not have occurred but for the deal. Professors Fischel and Lichtman do not contend that the \$0.0005 rate appears on the face of the agreements, and it is not a criticism of their analysis that these rates do not appear there.

769. During the hearing, Professors Fischel and Lichtman were each qualified as experts in economic analysis with no objection from SoundExchange. *See* Tr. at 5306:24-5307:3 (“Mr. Hansen: We offer Professor Fischel as an expert in economic analysis and valuation. Mr. Klaus: No objection. Chief Judge Barnett: Professor Fischel is so qualified.”); Tr. 3977:22-25 (Lichtman) (“Mr. Hansen: We offer Professor Lichtman as an expert in economic analysis. Chief Judge Barnett: Hearing no objection, Professor Lichtman is so qualified.”); *see also* Fischel/Lichtman WDT at ¶¶ 1-8 (describing Professors Fischel’s and Lichtman’s qualifications). SoundExchange’s belated attempt to impugn their qualifications as experts to offer opinions in support of iHeartMedia’s rate proposal should be rejected.

SoundExchange fails to acknowledge that Professor Katz testified that conducting an incremental analysis, as Professors Fischel and Lichtman did, is the “right way” to analyze iHeartMedia’s agreements. Tr. at 2879:5-14 (Katz) (“[T]he iHeart experts take the position that you want to focus on the margin payments, and I believe that is, in fact, how economists think is the appropriate way to think about payments. So *I believe that focusing on what they calculate at the marginal rate is the right way to do it.*” (emphasis added)).

770. SoundExchange claims that Professor Fischel made certain assumptions about iHeartMedia’s expectations concerning the iHeartMedia-Warner Agreement. This is false, and SoundExchange cites no evidence to support its assertion. In fact, Professor Fischel did not make any assumptions; rather, he used [REDACTED] [REDACTED] and projections that incorporate the parties’ contemporaneous expectations and assumptions about the future. *See* IHM FoF ¶ 183; Fischel/Lichtman WDT ¶ 40 & n.42 (“We understand that these projections reflected iHeartMedia’s best estimates at the time they were made, that these projections were

presented to iHeartMedia's Board of Directors."); Tr. at 5322:5-5323:5 (Fischel) (similar);

[REDACTED]

[REDACTED]

[REDACTED].¹⁷

771. This paragraph purports to describe Professors Fischel and Lichtman's incremental analysis of the iHeartMedia-Warner Agreement. For a complete description of this analysis, iHeartMedia refers the Judges to Part III of iHeartMedia's Findings of Fact, Professors Fischel and Lichtman's WDT, and Professor Fischel's testimony at the hearing.

772. SoundExchange correctly characterizes the math required for Professors Fischel's and Lichtman's incremental analysis as "simpl[e]," but fails to acknowledge that Professors Fischel and Lichtman analyzed all the terms of the iHeartMedia-Warner Agreement in their testimony. *See* Fischel/Lichtman WDT ¶¶ 33, 38, 39; Fischel/Lichtman WRT ¶¶ 99-101.

773. *See* response to paragraph 768. SoundExchange is correct that the amount of incremental revenues and performances are important inputs in Professor Fischel's analysis. But it is not a criticism of Professor Fischel's analysis (or any other economic analysis) to say that, if the inputs change, the result will change. Indeed, Professor Rubinfeld's conclusions are sensitive to the assumptions he made. *See* Fischel/Lichtman WRT ¶ 67.

774-775. SoundExchange compares the iHeartMedia-Warner Agreement to a "buy one, get one free" deal on ice cream cones, but the analogy is inapt. *See* IHM FoF ¶ 202; [REDACTED]

¹⁷ In footnote 28, SoundExchange incorporates by reference its erroneous argument that the Judges should assess proposed benchmark agreements based on actual performance under the agreements, rather than the expectations of the parties at the time they entered those agreements. iHeartMedia explains elsewhere the errors in that approach. *See* IHM FoF ¶¶ 196-197; IHM CoL Part I; IHM Response CoL Part I.

[REDACTED]

[REDACTED]

Judge Strickler's colloquy with Professor Fischel during the hearing demonstrates that that the ice cream cone analogy is misguided because it fails to account for the unique feature of this proceeding — namely, that the Judges are tasked with determining the rate to which a willing buyer and willing seller would agree in the absence of the statutory rate using market

deals that stand partially in the shadow of the statutory rate. In Judge Strickler’s hypothetical, a central planner sets a government mandated price of \$1 for the first ice cream cone a consumer buys and ice cream vendors strike deals with consumers where they sell two ice cream cones for \$1.05. *See* Tr. at 5368:18-5370:25 (Fischel).

Professor Fischel testified that, under those circumstances, if one’s objective was to “come up with the price of ice cream cones in the absence of what the central planner has dictated, . . . then you would disregard what the central planner decreed because the whole purpose of the exercise is to figure out what the price of ice cream cones would be between willing buyers and willing sellers in the absence of the central planner” and look for “evidence of what market participants were interested in buying or selling ice cream cones would transact for if the central planner didn’t exist” — which is precisely what Professor Fischel’s incremental analysis accomplishes. Tr. at 5368:18-5370:25 (Fischel). Whether Professor Fischel’s incremental analysis would fully apply, depends on whether customers are *always* going to buy the first ice cream cone regardless of the price of the second. If so, then \$0.05 is the market price for ice cream cones.¹⁸ If not, it is still apparent that the price the central planner has set for ice cream cones is far too high. If consumers were willing to pay \$1 for the second ice cream cone, vendors would not offer two ice cream cones for \$1.05.

776. Professor Fischel’s incremental analysis applies to all 29 of the in-market deals between noninteractive services and record labels that are the best available benchmarks for the Judges to use. *See* IHM FoF ¶¶ 10-14 (explaining that, in choosing benchmarks, evidence of in-market transactions is superior to evidence of transactions in other markets). Apple’s iTunes

¹⁸ This example requires one to set aside the fact that a person has — at some point — diminishing marginal utility from ice cream.

Radio is not a statutory service and is a poor benchmark for a host of other reasons. *See* IHM FoF Part VI. If, however, Apple's service was a statutory service and avoided all the other limitations that make it a poor benchmark, Professor Fischel's incremental analysis could certainly be applied to it, although doing so would require evidence of what Apple would have done with iTunes Radio in the absence of a direct license. That information was not available.

777. SoundExchange fails to acknowledge that Professor Katz testified that conducting an incremental analysis, as Professors Fischel and Lichtman did, is the "right way" to analyze iHeartMedia's agreements. Tr. at 2879:5-14 (Katz) ("[T]he iHeart experts take the position that you want to focus on the margin payments, and I believe that is, in fact, how economists think is the appropriate way to think about payments. So *I believe that focusing on what they calculate at the marginal rate is the right way to do it.*") (emphasis added). Professors Fischel, Lichtman, and Katz are all consistent with [REDACTED]

[REDACTED]. *See* IHM Response FoF ¶ 789.

Although Professor Shapiro did not conduct an incremental analysis of any deal, he agreed with Professor Fischel that the Pandora-Merlin Agreement and iHeartMedia's 28 agreements with record labels, including the iHeartMedia-Warner Agreement, "all involve discounts below the otherwise applicable statutory rates in exchange for steering," and support a rate that is significantly lower than the rate that SoundExchange is proposing. Shapiro WRT at 38.

778. *See* response to paragraph 777. This paragraph purports to describe Professor Fischel's analysis of the Pandora-Merlin Agreement. iHeartMedia refers the Judges to Section III.D of iHeartMedia's Proposed Findings of Fact and Section II.D of Professors Fischel and Lichtman's WDT for a complete description of this analysis.

Professors Fischel and Lichtman and Professor Shapiro have a consistent view of the effective rate Pandora pays under the Pandora-Merlin Agreement. All experts agree on the average rate, and no experts representing the Services disagree with Professors Fischel and Lichtman's calculation of the incremental rate. *Compare* Fischel/Lichtman WDT ¶ 77 (reporting Professor Shapiro's calculation of the average rate), *with* Shapiro WDT at 31.

Using Pandora's contemporaneous projections, Professors Fischel and Lichtman calculated an incremental rate of between [REDACTED] per performance, depending on [REDACTED]

[REDACTED]. *See* IHM FoF ¶ 233. SoundExchange asserts that "no rights holder" has paid for performances in the current environment where they may charge a substantial fee. However, the incremental rate calculation is consistent with [REDACTED]

[REDACTED] IHM FoF ¶ 233, record labels' well-documented willingness to waive royalties in order to get additional promotional plays, *see* IHM FoF ¶¶ 140-144, and the testimony of SoundExchange's own witnesses that some record companies would be willing "to go to zero" royalties in order to get additional plays on noninteractive services, IHM FoF ¶ 132 & n.16 (citing Tr. at 650:8-21 (Van Arman)); *see also* Fischel/Lichtman WDT at 40 n.84 ("[I]t is economically possible to have a negative incremental rate, in which a label accepts less compensation for more performances" including where a label "could potentially experience substantial promotional benefits from greater exposure on Pandora."). Indeed, federal law continues to prevent the reverse payments to terrestrial broadcasters known as "payola." *See* 47 U.S.C. § 317; 47 C.F.R. § 73.1212; *cf.* Tr. at 5676:18-24 (Judge Strickler: "We don't even know which way the money would flow. Use payola in the past, but you don't know if the money is

flowing from the record companies to the radio stations or from the radio stations to the record companies”).

779. Although iHeartMedia’s Board of Directors received three sets of projections —

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

Professor Fischel used the projections in the [REDACTED]
because those projections [REDACTED]
[REDACTED] at the time of the iHeartMedia-Warner Agreement. *See* IHM FoF ¶ 183;
Fischel/Lichtman WDT ¶ 40 & n.42. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Whether the [REDACTED]

[REDACTED] projections later turned out to be right or wrong is irrelevant to the question at issue,

namely: What did the parties believe they were agreeing to at the time they made the agreement? *See* IHM CoL Part I; IHM Response CoL Part I; IHM FoF ¶¶ 196, 197. That question is answered by the [REDACTED] projections.

780-783. These paragraphs purport to describe Professors Fischel and Lichtman's incremental analysis of the iHeartMedia-Warner Agreement. For a complete description of this analysis, iHeartMedia refers the Judges to Part III of iHeartMedia's Proposed Findings of Fact, Professors Fischel and Lichtman's WDT, and Professor Fischel's hearing testimony.

784. See response to paragraph 773. [REDACTED]

[REDACTED]. Instead, this claim is inadmissible lawyer "expert" testimony. *See* IHM Response CoL Part II. SoundExchange cites two lines of hearing transcript as support for this new analysis, but Professor Fischel merely confirmed that he saw [REDACTED]. *See* [REDACTED]. Professor Fischel did not do a calculation and derive an incremental rate from the [REDACTED], as counsel for SoundExchange has attempted to do here. Moreover, it is nonsensical and irrelevant to combine estimated revenue figures from one set of projections with estimated performances from another set of projections, since revenues under the deal [REDACTED].

This analysis is also irrelevant because Mr. Wilcox — the only witness from Warner to testify in this proceeding — identified a document other than the Warner Board Deck (SX Ex. 367) as the one reflecting Warner's contemporaneous expectations about the iHeartMedia-Warner Agreement and attached it to his written testimony; that projection shows that Warner

expected to receive [REDACTED] for incremental performances. *See* IHM FoF ¶¶ 191-193. At the hearing, [REDACTED]

785-787. See response to paragraph 773. Although the iHeartMedia-Warner

Agreement [REDACTED]

[REDACTED] — as SoundExchange acknowledges in this paragraph — “the agreement created an economic incentive for iHeart to play more Warner sound recordings.” *See also, e.g.*, IHM FoF ¶ 134; Wilcox WDT at 10; [REDACTED]

788. SoundExchange misrepresents Mr. Pittman’s testimony. In the portion of Mr. Pittman’s testimony that Warner quotes, Mr. Pittman is generally describing iHeartMedia’s approach to agreements with record labels: iHeartMedia increases the record label’s volume of

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Mr. Cutler likewise explained that the iHeartMedia-Warner Agreement, like all 28 of iHeartMedia's agreements with record labels, is premised on the notion that the record label will receive incremental plays and revenues over and above what they would receive absent a deal.

So the basic idea was, in exchange for relief on royalty payments, we agreed and ultimately did play these music labels tracks more digitally, and so they in return received, you know, greater amounts of promotion and because of the way the deals work, even though the rate may have been lower, *the additional plays actually resulted in more money being paid to the labels*. So, you know, in our minds, it was a win-win. We were able to achieve lower royalty costs. *The labels were able to get greater promotion for their artists while also making more money in the end.*

Tr. at 7238:8-20 (Cutler) (emphasis added).

789. [REDACTED]

[REDACTED]. See Fischel/Lichtman WRT ¶ 85. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. See Fischel/Lichtman WRT ¶ 85; “[REDACTED]

[REDACTED]; Cutler WDT ¶ 9

[REDACTED] “demonstrated what iHeartMedia would pay Warner for the use of its sound recordings absent a deal, as well as what it would pay — and the additional performances it would receive — if the deal were signed.”).

[REDACTED]

[REDACTED]

[REDACTED]; see Fischel/Lichtman WRT ¶ 85 (collecting examples). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; see IHM FoF ¶¶ 191-193; [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; see also [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

This paragraph also incorporates by reference SoundExchange's arguments in paragraphs 806 to 832 concerning selected [REDACTED] [REDACTED] Wilcox WRT ¶¶ 22-23. Those arguments are addressed below.

790. SoundExchange cites no evidence to support the assertions in this paragraph which are, instead, lawyer-generated recalculations of Professors Fischel and Lichtman's analysis of the "incremental" rate under the iHeartMedia-Warner Agreement. Indeed, none of these recalculations is sponsored by a fact or expert witness and, therefore, cannot be considered by the Judges as evidence. In any case, these analyses, conducted by counsel two years after the iHeartMedia-Warner Agreement and in the context of this proceeding, are irrelevant because they are not based on the parties' actual expectations. [REDACTED]

[REDACTED]

[REDACTED]. See IHM FoF ¶¶ 199, 205;

██████████; *see also* Wilcox WRT ¶ 23 (describing the provisions concerning
██████████ as “protections”). ██████████
██████████
██████████
██████████. *See* IHM FoF
¶ 206. ██████████
██████████. *See*
id. ¶¶ 205-206. ██████████
██████████
██████████. *See id.* ¶ 180. Finally, there can be no basis to
conclude that iHeartMedia would have paid ██████████ per performance when it could have had the
same performances at the statutory rate of \$0.0025 in 2015.

791. Professors Fischel and Lichtman did not use the ██████████ projection
because they perceived it to be the most realistic in hindsight; they used the ██████████
projection because the uncontroverted evidence shows ██████████
██████████
██████████. *See* IHM FoF ¶ 183; Fischel/Lichtman WDT at
¶ 40 & n.42; ██████████
██████████
██████████. SoundExchange quotes selectively from
Professor Fischel’s testimony. In the very passage SoundExchange cites, ██████████
██████████

[REDACTED]
[REDACTED].¹⁹

792. Although SoundExchange criticizes Professor Fischel for analyzing a single set of Warner projections — that show that Warner expected to earn [REDACTED] per incremental performance — SoundExchange ignores that Mr. Wilcox identified those as “Warner’s projections” for the iHeartMedia-Warner Agreement. *See* IHM FoF ¶¶ 191-193; Wilcox WRT ¶ 15; [REDACTED]. It was entirely proper for Professor Fischel to analyze the projections that Mr. Wilcox identified as “Warner’s projections,” and not to analyze other documents that no one from Warner testified reflected Warner’s projections for the iHeartMedia-Warner Agreement.

793. Although SoundExchange contends that Professor Fischel should have treated a different set of projections — [REDACTED] — as reflecting iHeartMedia’s expectations, [REDACTED]
[REDACTED]. SoundExchange cites only [REDACTED]; it cites no testimony to support the two tables on page 262 or the assertions regarding the calculations in those tables in this paragraph. Those tables are lawyer-generated, not sponsored by a fact or expert witness, submitted after the close of the evidence, and cannot be considered by the Judges as evidence. *See* IHM Response CoL Part II. [REDACTED]
[REDACTED]

¹⁹ [REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]. SoundExchange has no response to this testimony.

794. SoundExchange cites no testimony to support the two tables on page 264 or the assertions regarding the calculations in those tables in this paragraph. Again, those tables are lawyer-generated, not sponsored by a fact or expert witness, submitted after the close of the evidence, and cannot be considered by the Judges as evidence. *See* IHM Response CoL Part II.

SoundExchange asserts that Professor Fischel should have analyzed the model Mr. Wilcox described as [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Wilcox WRT ¶ 15; [REDACTED]. But there is no credible evidence that the [REDACTED] model actually reflected Warner's pre-deal expectations for the iHeartMedia-Warner Agreement. Moreover, to the extent that SoundExchange again relies on the [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

795. SoundExchange cites no evidence to support the assertions in this paragraph. In fact, the record shows that the average rate that the parties expected iHeartMedia would pay Warner per play under the iHeartMedia-Warner Agreement does not reflect the rate that would

have been reached in a market without the statutory license. *See* IHM FoF ¶ 187;

Fischel/Lichtman WDT ¶¶ 44-45. Nonetheless, [REDACTED]

[REDACTED] — is, by itself, significant market evidence that the current statutory rates are too high and that the Judges should reject SoundExchange’s proposal to raise them further. *See* IHM FoF ¶ 186.

796. This paragraph cross-references Section IV.A of SoundExchange’s Proposed Conclusions of Law. iHeartMedia refers the Judges to Part I of iHeartMedia’s Proposed Conclusions of Law and Part I of iHeartMedia’s Response to SoundExchange’s Proposed Conclusions of Law, which explain why, in evaluating benchmark agreements, the Judges should look to the parties’ expectations at the time of the agreement, not post-agreement performance. *See also* IHM FoF ¶¶ 196-197.

797. iHeartMedia and Pandora have every incentive to use realistic projections to evaluate potential agreements; both iHeartMedia and Pandora have shareholders closely watching their financial performance. In fact, [REDACTED]

[REDACTED]. Moreover, this paragraph contains three errors — two factual errors and one legal error. *First*, in claiming that Professor Fischel analyzed only one party’s expectations, SoundExchange ignores that Professor Fischel analyzed both iHeartMedia’s and Warner’s expectations for the iHeartMedia-Warner Agreement, finding that iHeartMedia’s expectations [REDACTED] and Warner’s expectations [REDACTED] were [REDACTED]

[REDACTED]. IHM FoF ¶¶ 191-193; [REDACTED]

[REDACTED]

[REDACTED]. *Second*, these were not merely internal projections as SoundExchange claims; the record shows that [REDACTED]

[REDACTED]. *See* Wilcox WRT ¶ 15 (describing [REDACTED]; Barros WRT ¶ 15 (similar). *Third*, SoundExchange repeats its legally erroneous argument that the Judges should look to actual performance under an agreement as opposed to the expectations of the parties. *See* IHM Response FoF ¶ 796.

798. *See* response to paragraphs 764 and 765. The record shows that informed economic actors in both the interactive and noninteractive music streaming markets — as well as the labels themselves — are aware that their agreements may be used in proceedings before the CRB as both types of agreements have been used in this and prior proceedings. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; *see* IHM FoF ¶¶ 359-362. If it were the case, as SoundExchange claims, that mere awareness that an agreement could be used as evidence in this proceeding rendered it “unreliable,” every one of the agreements offered in this proceeding would be equally “unreliable.” Unless the parties conspire to make the headline rate look either lower than economic reality (which would benefit the service) or higher than economic reality (which would benefit the record labels), agreements are reliable evidence of the terms agreed to by willing buyers and willing sellers in the shadow of the statutory rate. In fact, evidence shows that setting a precedent for the CRB [REDACTED]

[REDACTED]

[REDACTED]. See IHM FoF ¶¶ 359-362.

Professor Lichtman and Mr. Cutler testified that services and record labels [REDACTED]

[REDACTED]. Neither testified — as SoundExchange suggests in this paragraph — that iHeartMedia’s agreements are “unreliable” evidence of terms that willing buyers and willing sellers agree to in the shadow of the statutory rate. Moreover, whatever degree of awareness iHeartMedia’s executives had of these proceedings, Warner’s executives had equal awareness, and presumably would have attempted to counteract any attempt to make the contracts favorable to iHeartMedia as a benchmark. It is precisely because [REDACTED] [REDACTED], that the agreement *is* reliable for that purpose.

799-802. These paragraphs are based on the erroneous premise that the Judges should look to after-the-fact performance data, rather than contemporaneous expectations, to discern what willing buyers and willing sellers would agree to. See IHM CoL Part I; IHM Response CoL Part I; IHM FoF ¶¶ 196-197. Updated projections for the remainder of the term of existing agreements would not be helpful to the Judges for the same reason that *ex post* performance data is not helpful: They would not be probative of what the parties initially *agreed to*. See IHM CoL Part I; IHM Response CoL Part I; IHM FoF ¶¶ 196-197. Notably,

SoundExchange cites no evidence or fact witness testimony in these paragraphs; they contain only lawyer-generated arguments and no proposed factual findings.

803. SoundExchange misrepresents Mr. Cutler's testimony. Mr. Cutler testified that whenever he creates projections for iHeartMedia's business, he starts by [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. One of the problems of using after-the-fact performance data to adjust the price at which a transaction willingly occurred is that the "price" will continually vary during the term of the agreement. Under SoundExchange's theory, if iHeartMedia has a strong 2016, the price would need to be readjusted downward.

Whether and to what extent iHeartMedia's projections for the iHeartMedia-Warner Agreement would be different if re-created today is irrelevant for two reasons. *First*, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; IHM CoL Part I; IHM Response CoL Part I; IHM FoF ¶¶ 196-197. *Second*, if iHeartMedia's projections today were more pessimistic than its projections in 2013, iHeartMedia would likely not agree to the

same deal with Warner today; iHeartMedia would negotiate terms less favorable to Warner in the face of more pessimistic projections.

804. SoundExchange quotes selectively from Judge Strickler's questioning of Mr. Harrison concerning the substitutive effect of *interactive* services. Judge Strickler asked Mr. Harrison whether the rates in Universal's agreements with interactive services reflect Universal's understanding of the substitutive effect of the interactive service. *See* Tr. at 975:21-978:15 (Harrison). Mr. Harrison confirmed that they do, noting that Universal's understanding of the substitutive effect of interactive services has evolved over time. *See* Tr. at 975:21-978:15 (Harrison). Mr. Harrison did not testify — as SoundExchange suggests in this paragraph — about Universal's understanding as to the promotional effect of iHeartRadio or other noninteractive services, or how that understanding would influence a hypothetical agreement with a statutory service.

805. SoundExchange cites no evidence in this paragraph, but instead repeats its lawyers' argument that, in determining the rates to which a willing buyer and willing seller agreed in an agreement offered as a benchmark, the Judges should consider actual performance data rather than the expectations of the parties at the time they entered the agreement. iHeartMedia has demonstrated the error in that argument. *See* IHM CoL Part I; IHM Response CoL Part I; IHM FoF ¶¶ 196-197.

806. The iHeartMedia-Warner Agreement contains [REDACTED]
[REDACTED]
[REDACTED]. *See* IHM
FoF at ¶¶ 179-181; Fischel/Lichtman WDT ¶¶ 38-39; Fischel/Lichtman WRT ¶¶ 99-100.
[REDACTED]

[REDACTED]

[REDACTED]. See IHM FoF at ¶¶ 179-181; Fischel/Lichtman WDT ¶¶ 38-39; Fischel/Lichtman WRT ¶¶ 99-100; *see also* [REDACTED]

[REDACTED]

Unlike the parties' contemporaneous projections, Mr. Wilcox's assertion — two years after the fact in the context of this proceeding — that [REDACTED]

[REDACTED], sheds no light on what the parties agreed to when they negotiated and signed the iHeartMedia-Warner Agreement in 2013. Mr. Wilcox presented no analyses, contemporaneous or otherwise, to support his assertion that [REDACTED]

[REDACTED]. See Wilcox WRT ¶¶ 22-24.

807. SoundExchange misrepresents Professor Fischel's testimony. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. But, it does not follow from the fact that these [REDACTED]

[REDACTED]

[REDACTED]. Neither party did so, as Sound Exchange concedes in this paragraph.

[REDACTED]

[REDACTED].

808. SoundExchange cites no evidence in this paragraph to support the assertion that

[REDACTED]

[REDACTED]

[REDACTED]. This naked assertion is not credible for at least two reasons. *First*, [REDACTED]

[REDACTED]

[REDACTED]. For example, [REDACTED]

[REDACTED]

[REDACTED]; Wilcox WRT ¶ 23 [REDACTED]

[REDACTED]; *see also* [REDACTED]

[REDACTED]. *Second*, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

809. Professor Fischel addressed all of the terms of the iHeartMedia-Warner agreement listed in paragraphs 810 to 814. *See* Fischel/Lichtman WDT ¶¶ 33-34, 36, 38-39.

810. SoundExchange's claim that Professor Fischel ignores the provision in the iHeartMedia-Warner Agreement that [REDACTED]

[REDACTED] is plainly false; this provision is central to Professor Fischel's "incremental analysis." *See, e.g.,* Fischel/Lichtman WDT ¶ 36.

[REDACTED]
[REDACTED]
[REDACTED] While the record indicates that [REDACTED]
[REDACTED]
[REDACTED]. *See* IHM FoF
¶ 208; [REDACTED]

[REDACTED]
During the hearing, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]; *see also* [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

811. SoundExchange asserts that the [REDACTED]

[REDACTED]
provided some economic benefit to Warner, but the evidence is to the contrary. The contemporaneous evidence shows that [REDACTED]

[REDACTED]. See IHM FoF ¶¶ 211-212; Fischel/Lichtman WDT ¶ 34; [REDACTED]

812-814. These paragraphs purport to describe three terms in the iHeartMedia-Warner contract that SoundExchange faults Professors Fischel and Lichtman for

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. Mr. Wilcox described these terms as [REDACTED]
[REDACTED] in his written testimony. Wilcox WRT ¶¶ 22-23; *see also* [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]. See IHM FoF ¶ 205; [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. See IHM FoF

¶¶ 179-181.

815. [REDACTED]
[REDACTED]
[REDACTED]. See IHM FoF ¶¶ 198-199; [REDACTED]
[REDACTED]
[REDACTED]; Wilcox WRT ¶ 23 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

816. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. See, e.g., IHM FoF ¶ 199; Poleman WRT ¶¶ 20-22; Tr. at 5348:15-18 (Fischel); Tr.

at 6408:24-6409:3 (Rubinfeld); [REDACTED]

[REDACTED]
[REDACTED].

[REDACTED]
[REDACTED]. For instance, during the negotiations of the iHeartMedia-Warner Agreement, as SoundExchange acknowledges in this paragraph, Warner told iHeartMedia [REDACTED]

[REDACTED] See IHM FoF ¶ 199; [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]; see also [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

SoundExchange quotes selectively from Mr. Cutler's testimony. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]; see also [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

The fact that the agreement uses the term [REDACTED] does not compel the conclusion that the parties [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

817. SoundExchange relies on the [REDACTED]

[REDACTED]
[REDACTED].

and identified a different document as reflecting Warner's financial model of the iHeartMedia-Warner Agreement, *see* Wilcox WRT ¶ 15; [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]; *see* [REDACTED]
[REDACTED].

[illegible]

SoundExchange's claims regarding three additional documents fare no better, as SoundExchange again cites no witness testimony about any of the three documents on which it relies. Nor do the documents support SoundExchange's lawyers' assertion that three of Warner's "internal documents" show that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

The third document is not an internal Warner document at all. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

818. In the very document that SoundExchange cites here, iHeartMedia made it clear that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

SoundExchange quotes selectively from and misrepresents Mr. Poleman's testimony concerning [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; *see also* [REDACTED]

[REDACTED].

819. Mr. Wilcox's bare assertion, two years after the iHeartMedia-Warner Agreement was negotiated and in the context of this proceeding, that Warner [REDACTED]

[REDACTED] is irrelevant to the question of whether Warner

[REDACTED]

[REDACTED]. There was no testimony whatsoever that Warner [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].²⁰

820. Admitted. Mr. Pittman's testimony that radio airplay provides significant promotional benefits to record labels shows that record labels should be willing to discount their royalty rates in order to get more radio airplay as they have, in fact, done in 28 agreements with iHeartMedia. Mr. Pittman did not testify that iHeartMedia's [REDACTED]

[REDACTED]

[REDACTED].

²⁰ [REDACTED]

[REDACTED]

821.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

822. SoundExchange misunderstands the nature of insurance. One does not sign up for insurance in order to get a benefit one would not otherwise have; one signs up for insurance in order to guard against the possibility that an existing benefit will be taken away. Insurance only has value to the extent that there is some risk of a loss. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

823. In this paragraph, SoundExchange asserts: "No one from iHeart testified that iHeart [REDACTED] That is false.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Notably, in this paragraph, SoundExchange, attempts to use Warner's [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

824. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

825-826. SoundExchange claims that [REDACTED] are highly valuable to Warner, but this claim is belied by the fact that Warner has not made full use of the

[REDACTED]. While Warner is [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. See [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. See IHM FoF

¶ 205; [REDACTED]
[REDACTED]
[REDACTED].

827. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²¹ Mr. Wilcox's valuation is unreliable for the additional reason that it is based [REDACTED]
[REDACTED], rather than the terms of the contract. iHeartMedia
[REDACTED]
[REDACTED]. Mr. Wilcox's calculation therefore has no relationship to the value
of the contractual commitment. [REDACTED]
[REDACTED].

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. Consequently, any adjustment for pre-1972 content would be based on speculation.

828. SoundExchange faults Professor Fischel for failing to include in his analysis of the iHeartMedia-Warner Agreement [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. See IHM FoF

¶ 206; [REDACTED].

SoundExchange's suggestion that the [REDACTED]
[REDACTED] is not supported by: (a) the parties' contemporaneous documents;
(b) Warner's contemporaneous financial models; (c) Warner's post-deal documents; or (d) Mr. Wilcox's testimony.

(a) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

(b) None of the three financial models SoundExchange cites treats the [REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. Notably, SoundExchange fails to
cite the financial model that Mr. Wilcox identified as “Warner’s projections” for the
iHeartMedia-Warner Agreement and attached to his written testimony, which also describes the
[REDACTED] See IHM FoF ¶¶ 191-193; Wilcox WRT ¶ 15;
[REDACTED]

(c)

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

(d)

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

829. This paragraph misrepresents Mr. Cutler's and Professor Fischel's testimony. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

830. SoundExchange confuses a dispute over valuation with a dispute over allocation. SoundExchange and iHeartMedia disagree as to the correct [REDACTED], but there is no disagreement as to the value of the [REDACTED] iHeartMedia made to Warner as a [REDACTED]. iHeartMedia's and SoundExchange's only disagreement as to the [REDACTED] concerns allocation. iHeartMedia allocates the [REDACTED] to the [REDACTED] as is consistent with the [REDACTED], the parties' contemporaneous documents and financial models, the parties' post-deal documents, and the testimony of Mr. Cutler. See IHM Response FoF ¶¶ 828-829. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; see IHM FoF ¶ 206.

831. SoundExchange argues that the [REDACTED] must have been a sham because [REDACTED] This is false. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

iHeartMedia is also in the business of making music-related television. Indeed, in May 2013, five months prior to the iHeartMedia-Warner Agreement, iHeartMedia publically announced that The CW Network would broadcast its many TV shows, including iHeartRadio's Music Festival, Ultimate Pool Party, Jingle Ball Concert, album release parties, live music series, and other concert events. *See* May 16, 2013 iHeartMedia Press Release, *available at* <http://www.iheartmedia.com/Pages/The-CW-and-Clear-Channel-Media-and-Entertainment-Announce-Multi-Year-Broadcast-Agreement-for-the-iHeartRadio-Music-Festival.aspx>; [REDACTED]

_____ . This is unsurprising given that iHeartMedia's CEO, Bob Pittman, was the founder and first CEO of MTV. *See* Tr. at 4796:13-17 (Pittman).

832. SoundExchange cites no evidence to support the assertions in this paragraph. To the extent this paragraph merely summarizes preceding paragraphs, see iHeartMedia's responses to those paragraphs.

833-841. These paragraphs describe the steps of Professor Rubinfeld’s flawed analysis of the iHeartMedia-Warner Agreement, which is based on *ex post* outcomes from the first eight months of the [REDACTED] agreement. iHeartMedia has already shown that Professor Rubinfeld’s analysis of the iHeartMedia-Warner Agreement is unreliable and unpersuasive. *See* IHM FoF Part III.B.4. The error in Professor Rubinfeld’s analysis is seen most simply in his conclusion that iHeartMedia agreed to pay to Warner [REDACTED] [REDACTED] as part of the iHeartMedia-Warner Agreement. Professor Rubinfeld has repeatedly asserted that no webcaster would ever make the irrational decision to pay *more* than the statutory rates. *See* IHM FoF ¶¶ 195-196; Rubinfeld WDT ¶ 98 & n.76 (“[T]he statutory rate operates as a ceiling for any negotiated rate.”); *see also* Talley WRT at 47 (“[N]o rational buyer would ever be willing to enter into a negotiated, consensual license calling for her to pay a price equal to or exceeding that statutory rate.”).

842. SoundExchange attempts in this paragraph to defend Professor Rubinfeld's patently flawed conclusion that iHeartMedia agreed to pay [REDACTED] by noting that both iHeartMedia and Warner were accepting risks when they entered the agreement. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. But it does not follow from the fact that iHeartMedia understood there was a downside risk that iHeartMedia [REDACTED]
[REDACTED].

There is no evidence that iHeartMedia was willing to make a bad business deal simply to reach agreement with a major record label. In fact, iHeartMedia's failed negotiations with Sony and Universal — in which both [REDACTED] — demonstrate that iHeartMedia was [REDACTED]
[REDACTED]. See SX's FoF ¶ 763 & n.27 (acknowledging Sony's and Universal's failed negotiations with iHeartMedia); [REDACTED].²²

SoundExchange's alternative theory that iHeartMedia wanted to reach an agreement that would "ma[k]e a higher rate justifiable" in order to obtain a "lower industry rate[]" in this proceeding makes no sense and, unsurprisingly, is not supported by any evidence. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

²² Notably, SoundExchange's assertion in this paragraph that iHeartMedia was desperate to make a deal [REDACTED]
[REDACTED]

843. See responses to paragraphs 824-826 and 833-842. SoundExchange's argument that the royalty rate iHeartMedia agreed to pay in the iHeartMedia-Warner Agreement is *even higher* than [REDACTED] is not credible given Professor Rubinfeld's own testimony no webcaster would ever make the irrational decision to pay *more* than the statutory rates. See IHM FoF ¶¶ 195-196; Rubinfeld WDT ¶ 98 & n.76 ("[T]he statutory rate operates as a ceiling for any negotiated rate.").

844-845. [REDACTED]

[REDACTED]. Because this deck was produced eight months after the iHeartMedia-Warner Agreement was negotiated and [REDACTED], it is irrelevant to the question of what the parties agreed to when they entered into the iHeartMedia-Warner Agreement. See IHM CoL ¶¶ 1-9; IHM FoF ¶¶ 196-197.

Even if it were relevant, the Judges cannot rely on this document because, as SoundExchange concedes in footnote 37 (appended to paragraph 845), "the only purpose" of some of the calculations in the deck was to [REDACTED]

Moreover, the first few months of the iHeartMedia-Warner Agreement are not an appropriate way of measuring the entirety of the agreement, since the agreement [REDACTED]

In other post-deal documents, created in the ordinary course of Warner's business, Warner has [REDACTED]

See, e.g.,

846. SoundExchange is correct that Professors Fischel and Lichtman calculated that iHeartMedia expected to pay an average per performance rate of [REDACTED] under the iHeartMedia Warner Agreement. *See* IHM FoF ¶ 186; Fischel/Lichtman WDT ¶ 43. As Professors Fischel and Lichtman stated, this demonstrates that parties are agreeing to rates well below the existing statutory rates. SoundExchange’s criticisms of that average rate calculation, made as though it were intended as a benchmark for the statutory rate in this proceeding, are both irrelevant — the average rate includes plays subject to the statutory rate and thus within the shadow of that rate — and erroneous, as explained below.

847-851. These paragraphs contain several criticisms of iHeartMedia's projection. These criticisms are wrong and irrelevant.

First, SoundExchange contends that iHeartMedia used the wrong per-play rate for plays on custom radio. However, as Professors Fischel and Lichtman explained, iHeartMedia adjusted the per-play rates for [REDACTED]

[REDACTED] Fischel/Lichtman WDT

¶ 35. SoundExchange has no evidence — or even argument — in support of its assertion that this adjustment did not accurately [REDACTED] The appearance of the word [REDACTED]

in the spreadsheet is not evidence, one way or another, as to whether this adjustment accurately reflected iHeartMedia's expectations as to the per-play rates it would pay for [REDACTED]

[REDACTED] The uncontroverted evidence is that this adjustment, like all of the calculations in this spreadsheet, reflected iHeartMedia's best estimates at the time of the iHeartMedia-Warner Agreement.

Second, SoundExchange makes two contradictory criticisms of the way iHeartMedia accounted for "digital-only" webcasts (*i.e.*, pre-programmed genre stations on iHeartRadio). In paragraph 849, SoundExchange claims iHeartMedia erred by applying the same per-plays rates to "digital-only" webcasts and custom radio. In paragraph 850, SoundExchange claims that iHeartMedia erred by treating "digital-only" webcasts as encompassed by the [REDACTED]

[REDACTED]. In fact, iHeartMedia treated "digital-only" webcasts as [REDACTED] because iHeartMedia planned to, and did, convert all of its "digital-only" webcasts to HD terrestrial broadcasts and simulcasts which are covered by [REDACTED] immediately after the iHeartMedia-Warner

Agreement. *See* IHM FoF ¶¶ 207-208; [REDACTED]

[REDACTED]

[REDACTED]; *see also* [REDACTED]

[REDACTED]

[REDACTED]. Converting these digital-only stations to HD simulcasts is allowable under the agreement, and therefore is not, as SoundExchange claims, inconsistent in any way with the plain language of the agreement.

Third, even when Professor Rubinfeld changed these aspects of the [REDACTED] projections, he arrived at an expected average per-play rate of [REDACTED], which is close to the

average per-play rate of [REDACTED] calculated by Professors Fischel and Lichtman and still significantly lower than the statutory royalty rate. *See* IHM FoF ¶ 186; Fischel/Lichtman WDT ¶ 43. Thus, Professor Rubinfeld's calculation, even if it were appropriate, only further supports the conclusion that iHeartMedia and Warner agreed to an average per-play rate well below the statutory rates in the iHeartMedia-Warner Agreement.

Finally, none of SoundExchange's flawed criticisms changes the fact that the undisputed record evidence shows that the [REDACTED] projections were the ones that iHeartMedia actually considered and utilized when entering into the deal. Thus they reflect the economic costs and benefits that iHeartMedia, in fact, anticipated when it approved the agreement.

852. See responses to paragraphs ¶¶ 806-832.

853. This paragraph outlines three adjustments to Professors Fischel and Lichtman's calculations. Only one of these calculations was conducted by Professor Rubinfeld; the others are improper post-hearing "expert" lawyer testimony. *See* IHM Response CoL Part II. All three calculations are incorrect for the same reason; they assign, absent any basis to do so, [REDACTED] in the iHeartMedia-Warner Agreement that the parties themselves [REDACTED] and without assigning any value to the [REDACTED] [REDACTED] Whatever value Warner's [REDACTED] may have for Warner, there is no basis to conclude that the net value of all the [REDACTED] associated with the agreement is not approximately zero. SoundExchange is simply selecting the terms of the agreement that favor it, assigning arbitrary values to those terms, and ignoring the other unfavorable terms.

First, SoundExchange cites Professor Rubinfeld's calculation that the average per-play rate of the iHeartMedia-Warner Agreement is [REDACTED] per play. Professor Rubinfeld's calculation is incorrect because he improperly treats Warner's [REDACTED] as the equivalent of a [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]; IHM FoF ¶¶ 198-199.

Second, counsel for SoundExchange has calculated an average per-play rate for the iHeartMedia-Warner Agreement using Mr. Wilcox's valuation of [REDACTED]. Professor Rubinfeld did not include nor assign any value to [REDACTED] in his analysis of the iHeartMedia-Warner Agreement in his written direct testimony, his rebuttal testimony, or during the hearing. *See* IHM FoF ¶ 205. These calculations are inadmissible "expert" lawyer testimony. In any case, Mr. Wilcox's valuation of [REDACTED] is not credible for the reasons stated above in IHM Response FoF ¶¶ 825-826.

854. *See* IHM Response FoF ¶¶ 770, 779, 791, 793 & 842. Professors Fischel and Lichtman used the [REDACTED] projections because those projections reflect iHeartMedia's actual expectations for the future of its iHeartRadio business at the time of the iHeartMedia-Warner Agreement. *See* IHM FoF ¶ 183; Fischel/Lichtman WDT ¶ 40 & n.42; Tr. at 5322:5-5323:5 (Fischel). [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]. See [REDACTED]

SoundExchange misrepresents Mr. Cutler's testimony. In the portion of his testimony that SoundExchange quotes, [REDACTED]

[REDACTED]
[REDACTED]
He did not testify that iHeartMedia considered the [REDACTED] case to be the most realistic at the time of the iHeartMedia-Warner Agreement. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. SoundExchange has no response to this testimony.

SoundExchange cites two calculations conducted by Professor Rubinfeld. These calculations are irrelevant because they are based on cases — [REDACTED]
[REDACTED]
[REDACTED]. They were not relied upon by the iHeartMedia Board of Directors in approving the iHeartMedia-Warner Agreement and do not reflect iHeartMedia's best estimates of the future of its business at the time of the iHeartMedia Agreement.

SoundExchange's description of Professor Rubinfeld's calculations is misleading because SoundExchange fails to note that Professor Rubinfeld's calculations are not based on the

spreadsheet that contains the projections shared with the iHeartMedia Board of Directors and relied upon by Professors Fischel and Lichtman. Rather, Professor Rubinfeld's calculations are based on a modified version of this spreadsheet, which Professor Rubinfeld [REDACTED]

[REDACTED]

SoundExchange acknowledges that one of the three cases iHeartMedia developed and provided to its Board of Directors was a case that was more optimistic than [REDACTED]. See SX FoF ¶ 779; [REDACTED]. If, as SoundExchange claims, iHeartMedia would have taken into account the risk of slower growth than expected ([REDACTED]), it is unreasonable to conclude that iHeartMedia would not also have taken into account the risk of faster growth than expected ([REDACTED]). Under the [REDACTED], the average royalty rate iHeartMedia would have paid would have been lower than under [REDACTED]. There is no basis to focus on only the risk modeled by the more pessimistic projections while ignoring the possibility that the more optimistic projections could prove to be the most accurate.

855. This paragraph purports to describe Professor Fischel's calculation of Warner's expectations for the iHeartMedia-Warner Agreement, which he explained during his deposition and at the hearing, and is set out in paragraphs 191-193 of iHeartMedia Proposed Findings of Fact. In response to Mr. Wilcox's allegation that Professor Fischel's analysis did not reflect the joint expectations of the parties to the iHeartMedia-Warner Agreement, Professor Fischel reviewed the projections that Mr. Wilcox identified as reflecting Warner's expectations in his written rebuttal testimony and calculated that Warner expected iHeartMedia would pay [REDACTED]

for incremental performances of Warner music, which is very close to the rate iHeartMedia expected to pay. *See* IHM FoF ¶ 193; [REDACTED].²³

856-857. These paragraphs purport to offer an entirely new calculation using Warner's projections for the [REDACTED] [REDACTED]. This calculation was not sponsored by any fact or expert witness before or during the hearing. Instead, this claim is inadmissible lawyer "expert" testimony.

This calculation is also incorrect and irrelevant. It is incorrect because it includes [REDACTED] [REDACTED], which should be excluded from any analysis of the compensation paid for webcasting under the iHeartMedia-Warner Agreement for the reasons explained in iHeartMedia's responses to paragraphs 828 and 831, and [REDACTED] [REDACTED]. It is irrelevant because, unlike the incremental rate, the average per-play rate is not probative of what a willing buyer would pay a willing seller in a market without the statutory rate. The average per-play rate lumps together the first "bundle" of plays — which iHeartMedia would have purchased absent the deal and stand in the statutory shadow — with the second "bundle" of incremental plays — which iHeartMedia purchased only because of the deal and fall outside the statutory shadow.

²³ In his written testimony, Mr. Wilcox testified that, while Warner constructed several models during the negotiations of the iHeartMedia-Warner Agreement, the projections labeled [REDACTED] reflected Warner's pre-deal expectations for the iHeartMedia-Warner Agreement in June 2013. *See* Wilcox WRT ¶ 15; [REDACTED]; *see also* [REDACTED]

[REDACTED] To the extent that Mr. Wilcox gave contrary testimony at the hearing after Professor Fischel demonstrated that iHeartMedia's and Warner's pre-deal expectations for the iHeartMedia-Warner Agreement were similar, and inconsistent with Professor Rubinfeld's analysis, his testimony is not credible.

It is worth noting that, even when they improperly included the [REDACTED]
[REDACTED], SoundExchange's lawyers calculated an expected average
per-play rate of [REDACTED], which is *still lower than the current statutory royalty rates*, again
demonstrating that the existing rates are too high.

858. See IHM Response FoF ¶ 794. This paragraph purports to offer an entirely new
calculation based on [REDACTED]
[REDACTED]. This calculation was not sponsored by any fact or expert witness
before or during the hearing. Instead, this claim is inadmissible lawyer "expert" testimony.

In any case, there is no credible evidence that the [REDACTED] case
actually reflected Warner's pre-deal expectations for the iHeartMedia-Warner Agreement. Mr.
Wilcox described a different case in the same spreadsheet as reflecting Warner's expectations in
his written testimony. See Wilcox WRT ¶ 15; [REDACTED]

[REDACTED]. To the extent that SoundExchange again relies on the [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].²⁴

859. This paragraph of SoundExchange's proposed findings is blank.

²⁴ Notably, [REDACTED]
[REDACTED]. In this paragraph,
SoundExchange asserts that the [REDACTED]
[REDACTED].

860-863. The 27 independent record labels that have made agreements with iHeartMedia are important and sophisticated members of the music industry; they account for approximately [REDACTED] percent of plays on iHeartRadio; represent major artists, such as Taylor Swift and Paul McCartney; and thoroughly evaluate potential agreements with services before entering into them. *See* IHM FoF ¶ 213; [REDACTED]

[REDACTED]

There is no legal or factual basis for SoundExchange's suggestion that only agreements involving one of the three major record labels can be benchmarks. In determining what a willing buyer and a willing seller would agree to, the Judges may and should assume a competitive marketplace in which the record labels — big and small — compete with one another, rather than colluding. *See* IHM CoL Part III; IHM Response CoL Part III. Numerous witnesses testified that independent record labels effectively compete with major record labels for artists, accolades, and consumers, and are as sophisticated as the major record labels in licensing their content. *See, e.g.,* Tr. at 1251:22-1252:17 (Wheeler); [REDACTED]

[REDACTED]. Indeed, even Professor Rubinfeld rejected the notion that only agreements involving one of the three major record labels can be benchmarks. *See* Tr. at 2133:21-25 (Rubinfeld) (“Q. Is it your opinion that only the big three constitute willing sellers for the purpose of trying to analyze what a market would look like in this proceeding? A. No, that’s not my opinion.”).

The 27 agreements between iHeartMedia and independent record labels are real-world agreements from the noninteractive services market — the market at issue in this proceeding; they provide important additional and confirmatory evidence as to the rates negotiated by willing

buyers and willing sellers in the noninteractive services market and support a [REDACTED] per performance rate (and, in fact, alone would support a lower rate, of [REDACTED]). *See* IHM FoF ¶¶ 213-223 (explaining Professor Fischel's analysis of 27 agreements); IHM CoL ¶¶ 10-14 (explaining that, in choosing benchmarks, evidence of in-market transactions is superior evidence to transactions in other markets).

SoundExchange overstates the difference between the iHeartMedia-Warner Agreement and iHeartMedia's agreements with 27 independent record labels. *First*, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Second, in both sets of agreements, the operative rate for custom performances was expected to be and has, in fact, been the per-play rate and [REDACTED]; as a result, the difference in the [REDACTED] is irrelevant to the effective per-play rate. *See* IHM FoF ¶ 216. *Third*, in both sets of agreements, there are [REDACTED]
[REDACTED], to which no party assigned a monetary value before the deal and to which it is appropriate to assign a net value of zero. *See id.* ¶ 217; Fischel/Lichtman WDT ¶ 62. *Fourth*, the fact that the iHeartMedia-Warner Agreement includes a [REDACTED] has no effect on a financial analysis of the agreement; even Professor Rubinfeld did not assign additional value to the [REDACTED]. *See* Rubinfeld WDT ¶ 229.

When correctly analyzed using Professors Fischel and Lichtman's incremental analysis, iHeartMedia's agreements with the 27 independent record labels readily satisfy

SoundExchange's four-part "comparability" test. *First*, iHeartMedia and the 27 independent record labels are willing buyers and willing sellers, bargaining outside the shadow of the statutory license, as to the incremental performances that iHeartMedia would not have purchased absent an agreement. *Second*, as explained above, iHeartMedia and the 27 independent record labels are the types of buyers and sellers of webcasting performances contemplated by the statute. *Third*, Professors Fischel and Lichtman's incremental analysis corrects for the influence of the statutory rates by focusing on the incremental performances that iHeartMedia would not have purchased absent an agreement and bargained for outside of the shadow of the statutory rates. *Fourth*, the rights at issue in the agreements are the same or nearly identical to those at issue in this proceeding. Professors Fischel and Lichtman's analysis accounts for skips, *see* Fischel/Lichtman WDT ¶ 67, and most independent record labels have little or no pre-1972 music, *see, e.g.*, Van Arman WDT at 6 (explaining that independent record labels tend to have "younger, less established artists").

864-866. There is ample uncontroverted evidence that iHeartMedia and the independent record labels anticipated that iHeartMedia would increase those record labels' share of plays on iHeartRadio by [REDACTED] and that iHeartMedia has, in many cases, successfully done so. *See* IHM FoF ¶ 223; Fischel/Lichtman WDT ¶ 64 & n.63.

Mr. Pittman, iHeartMedia's CEO, and Mr. Cutler, iHeartMedia's Executive Vice President for Business Development and Corporate Strategy, testified that iHeartMedia's expectation that it would increase the independent record labels' share of performances on iHeartRadio by [REDACTED] was central to the logic of these agreements and iHeartMedia's pitch to the record labels. *See* Pittman WDT ¶ 12 (explaining how iHeartMedia struck "win, win" deals with record labels; as iHeartMedia "increases its usage of partners' music, it pays less per

play”); [REDACTED]; Cutler WDT ¶¶ 5, 7, 8 ([REDACTED]

[REDACTED]); Tr. at 7243:22-7244:6 (Cutler) (similar).

[REDACTED]; *see also* [REDACTED]

iHeartMedia has already succeeded in increasing independent record labels’ share of plays on iHeartRadio and is continuing its efforts to boost independent record labels’ share of plays even more, particularly on simulcast. *See* Cutler WDT ¶ 10 (describing iHeartMedia’s success in increasing record labels’ share of plays as of August 2013); [REDACTED]

[REDACTED] Littlejohn WDT ¶¶ 2-4 (describing iHeartMedia’s continuing efforts to increase record labels’ share of plays on simulcast using Song Exchange technology). [REDACTED]

As in the iHeartMedia-Warner Agreement, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

SoundExchange's description of Professors Fischel and Lichtman's calculations and their use of [REDACTED] is not accurate. Professors Fischel and Lichtman did not rely on this [REDACTED] for their understanding that iHeartMedia expected to increase each record label's share of performances on simulcast and custom radio by [REDACTED] (although it does reflect that expectation). *See* Fischel/Lichtman WDT ¶ 63. Rather, Professors Fischel and Lichtman used this data to estimate what iHeartMedia would have done in the absence of its agreements with the 27 independent record labels.

Professors Fischel and Lichtman compared the data in [REDACTED] [REDACTED] with data from July 2014 to determine how successful iHeartMedia had been in its efforts to increase independent record labels' share of plays to date. *See* Fischel/Lichtman WDT ¶¶ 64-65 & n.65. They found that, on average, iHeartMedia had increased these 11 independent record labels' share of plays on simulcast by [REDACTED] [REDACTED] *See id.* They then used this figure to estimate the number of times iHeartMedia would

have played music from the 27 independent record labels absent the licensing agreements on simulcast. *See id.* [REDACTED]

867. Professor Fischel does not ignore the provisions in iHeartMedia's agreements with independent record labels that [REDACTED] To the contrary, Professor Fischel conservatively treats *all* this [REDACTED] in calculating the average and incremental per-performance rates for these agreements. *See id.* ¶¶ 57-69 & Ex. D.

Professor Fischel also does not ignore the [REDACTED] in these agreements. Rather, he explains that because [REDACTED], and because no party assigned a monetary value to these terms in evaluating the agreements, he assigns a net value of zero to them as a group. *See* IHM FoF ¶ 217; Fischel/Lichtman WDT ¶ 62.

[REDACTED] While this term would not appear in the agreement if it had no value to the parties, there is no evidence that [REDACTED] believed this to be a financially material term. [REDACTED]

 _____; and there is
 no evidence that either party tried to calculate the monetary value of this term.²⁵ _____

 _____.

IHM FoF ¶ 74.

RESPONSE TO PART X – NAB/SIMULCAST ISSUES

868-878. iHeartMedia refers the Judges to NAB’s response.

879. This paragraph describes the absence of performance rights in sound recordings on terrestrial radio, but claims this “cost-free use” results from an “anomaly in existing copyright law.” The cited testimony does not support these characterizations. It is beyond serious dispute that, absent the laws that prohibit “payola,” record labels would pay terrestrial radio broadcasters to play their music because of the promotional benefits of such play. *See* Tr. at 82:3-14 (Mr. Pomertantz, Counsel for SoundExchange) (“[R]ecord companies try to get their music played on terrestrial radio, and that shows that terrestrial radio is promotional. They spent a lot of money to try to convince terrestrial radio to play new releases. They put a lot of effort behind it, but that — and that’s true. Other companies do try to get terrestrial radio stations to play their music. And many people at record companies believe that that helps to sell CDs and downloads. We’re not here to claim otherwise.”); Tr. at 966:16-23 (Harrison) (describing terrestrial radio as “a platform where we can break artists” that encourages “actually purchasing the album” and

²⁵ *See also* Fischel/Lichtman WDT Ex. E (pre-1972 content accounts for roughly 4.6 percent of performances on Pandora).

disagreeing that terrestrial competes with other forms of music consumption); Tr. at 1414:10-23, 1423:7-13 (Harleston) (similar).

880-881. iHeartMedia refers the Judges to NAB's response.

882-884. These paragraphs claim that the "assumption" that record labels would pay for airplay on terrestrial radio absent regulation "is not supported by the evidence." The cited testimony does not support this, but merely claims that the absence of a sound recording performance right on terrestrial radio is "unfortunate" and "unfair." As shown above, the evidence unequivocally shows that, absent regulation, record labels would pay terrestrial radio for airplay. *See* IHM Response FoF ¶ 879.

885. As demonstrated in Part II of iHeartMedia's Proposed Findings of Fact and Part XIII of iHeartMedia's Response to SoundExchange's Proposed Findings of Fact, simulcast and other forms of digital radio promote: They drive sales and break artists.

886-898. iHeartMedia refers the Judges to NAB's response.

899-900. *See* IHM Response FoF ¶ 885.

901. Admitted.

902. Admitted. However, the terrestrial radio stations that are simulcast on iHeartRadio are exclusively from the United States and Mexico.

903. Citing only Mr. Kooker, SoundExchange asserts that simulcast provides a "much different a different [sic] user experience" from terrestrial radio. Mr. Kooker has no basis to testify about the "user experience" on simulcast or terrestrial radio; he is a deal negotiator for Sony. Other record label executives contradicted Mr. Kooker. *See, e.g.*, Tr. at 1283:20-24 (Wheeler) ("Q. But simulcasting terrestrial radio literally is terrestrial radio online, isn't it? A. Yes, I think that makes sense. Q. It's the same stream for every listener? A. Yes."). And

other evidence demonstrates that simulcast and terrestrial radio are identical in all material respects. *See, e.g.*, Tr. at 4004:1-3 (Lichtman) (“Simulcast and terrestrial radio are the same music and the same deejays and the same news, head-to-head competition.”). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

904. This paragraph blatantly mischaracterizes the testimony of Dr. Peterson. He in no way “conceded” that the absence of a geographic limit on simulcast “raises the possibility that simulcast streams ‘could divert sales.’” [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

[REDACTED]. Thus, far from lending any support to SoundExchange’s claim, Dr. Peterson thoroughly distanced himself from it.

905. Mr. Wilcox's testimony that simulcast and terrestrial radio are "just totally different animals" also is entitled to no weight. Like Mr. Kooker, Mr. Wilcox is a deal negotiator and has no basis to testify about the similarities or differences between simulcast and terrestrial radio or their relative promotional effect. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

906. Admitted.

907. These paragraphs describe Mr. Kooker's "experiment" with iHeartRadio's search functionality for simulcast. As discussed above, this experiment was thoroughly discredited at the hearing, where Mr. Kooker was unable to search and find any of the songs presented to him, including those that were subject to his original experiment. *See* IHM Response FoF ¶¶ 275-276. Moreover, there is absolutely no evidence that consumers are actually using the search functionality of iHeartRadio's or any other simulcast service. *See id.* ¶ 290.

908. Mr. Burruss's unsupported testimony that simulcast is different from terrestrial radio because on simulcast "you can just turn around and find that song again" is plainly wrong on its face and, in any event, also is entitled to no weight. There is no evidence that Mr. Burruss has any knowledge or familiarity with simulcast services. Indeed, at the hearing, Mr. Burruss did not even realize that iHeartRadio was a streaming service, and mistakenly thought it was a terrestrial radio station. *See* Tr. at 7064:18-25 (Burruss) ("Q. I asked if you consider iHeartRadio to be a streaming service, not iHeartMedia. A. I consider iHeartRadio to be a terrestrial radio station. Q. You would not consider it to be a streaming services? A. I do

not.”). Mr. Burruss could not even answer whether the simulcast aspect of iHeartRadio was a streaming service, responding that “[t]hat’s a tough definition for me,” suggesting he is not personally aware of any distinctions between terrestrial radio and simulcast. Tr. at 7065:1-5 (Burruss); *see* Tr. at 7062:3 (Burruss) (“I don’t know if it’s the same.”); Tr. at 7061:24-7062:2 (Burruss) (“I’m not qualified, I don’t understand the whole concept of the Internet side of it.”); Tr. at 7062:4-6 (Burruss) (“Q. So you have no understanding how simulcast programming works? A. Not a hundred percent, no.”).

909. Mr. Blackburn’s testimony that listening to streaming would decrease the likelihood of purchasing music also is entitled to no weight. Mr. Blackburn and other SoundExchange witnesses conceded that there was no evidence linking the increase in streaming to the decrease in music sales. *See* IHM FoF ¶ 84; Tr. at 5994:23-5995:2 (Blackburn) (“Q. You could not say there was any statistically significant evidence that noninteractive services substitute for digital sales, correct? A. That’s correct. . . .”). There is, by contrast, extensive empirical evidence that statutory services promote music sales. *See* IHM FoF ¶¶ 145-162.

910. Admitted. This paragraph acknowledges that search functionality on simulcast at most allows users to find songs “in progress,” not at the beginning, and therefore concedes away SoundExchange’s arguments that search functionality makes simulcast similar to interactive services. There is absolutely no evidence that consumers consider finding a song “in progress” to be a substitute for starting that song at the beginning. Dr. Blackburn in fact conceded that the two are not the same. *See* Tr. at 1597:9-15 (Blackburn) (“Judge Strickler: You would equate joining a song in progress with the same customer satisfaction as being able to get the song from the start? [Dr. Blackburn]: I don’t think it’s the same, right. It’s obviously — it’s maybe a second best”).

911. SoundExchange also cannot rely on Dr. Rubinfeld’s testimony about the differences between simulcast and terrestrial radio. In his direct testimony, Dr. Rubinfeld stated that, “[b]ecause they bridge programmed terrestrial radio and webcasting, simulcasters occupy a unique position in the marketplace.” Rubinfeld WDT ¶ 149. At the hearing, Dr. Rubinfeld agreed that in making that statement, he wanted to distinguish simulcasting from custom webcasting, and he also acknowledged that simulcast was distinct from on-demand streaming. *See* Tr. at 2020:21-2021:8 (Rubinfeld). His written rebuttal testimony that simulcasting services “are competing more with on-demand services like Spotify” not only contradicts his other testimony, thereby undermining Dr. Rubinfeld’s credibility, but also lacks any support. Rubinfeld WRT ¶ 209. Dr. Rubinfeld does not even provide a citation for this assertion in his testimony.

912. As described above, [REDACTED]

[REDACTED]. *See* IHM Response FoF ¶ 295. [REDACTED]

913. This paragraph consists of lawyer argument, not proposed factual findings.

Moreover, while SoundExchange argues that whether simulcast “approache[s] so-called ‘on-demand’ functionality” is “not the point,” that is in fact the very point that SoundExchange has tried to make in its proposed findings. *See, e.g.*, SX FoF ¶ 290 (“[S]imulcasts also allow consumers to lean in and control their listening experience . . . This search functionality gives users the ability to immediately identify and access specific tracks essentially on demand.”); *id.* ¶ 291 (“Simulcast services therefore offer listeners the same wide range of listening options as other streaming services.”). SoundExchange now claims that the real point it is trying to make is

that these alleged differences between simulcast and terrestrial radio undermine the notion that they have “identical promotional effect.” This is a red herring. Even accepting all of SoundExchange’s alleged functional differences between simulcast and terrestrial radio, none relate to the promotional effects of these services. The evidence — and common sense — demonstrates that, at their core, simulcast and terrestrial radio are the same, including with respect to their promotional effect. *See* IHM FoF ¶¶ 123-126.

914-915. The fact that TuneIn, an aggregator of radio simulcasts, shows users in-progress songs on log-in, and allows some personalization of that list, is of no consequence. As described above, being able to access in-progress songs is fundamentally different than being able to play songs from the beginning. *See* IHM Response FoF ¶ 910. Moreover, providing a list of songs that are currently playing on the radio (which may number in the hundreds or at most thousands) is very different from providing them on-demand access to tens of millions of songs. *See, e.g.,* Time, *13 Streaming Music Services Compared by Price, Quality, Catalog Size and More* (March 2014) (IHM Ex. 3646 at 3) (noting that Rdio and Spotify have catalogs of 20 million songs, and Rhapsody 32 million songs).

916-917. The extremely limited pause and recording capabilities of TuneIn also are irrelevant. SoundExchange concedes (in ¶ 918) that this functionality “does not transform a simulcast into a so-called ‘on-demand’ service.”

918. This paragraph consists solely of lawyer argument, not proposed factual findings. Moreover, SoundExchange’s claim that limited functional differences between simulcast and terrestrial radio suggest that they have different promotional effects is unsupported and contradicted by extensive record evidence. *See* IHM Response FoF ¶ 913.

919. Mr. Downs's testimony does not suggest differences in the promotional effect of simulcasting and terrestrial radio. When asked whether advertisers see the same promotional effect on simulcast and terrestrial, Mr. Downs responded that "Well, I can't really speak for what they think" but that advertisers "all seem to ask for [simulcast] to be thrown in at no charge." Tr. at 5242:24-5243:13 (Downs). This is consistent with the testimony of other fact witnesses who explained that, although labels do not always specifically reference simulcast in seeking promotion, it is understood in such discussions that promotion on terrestrial radio includes promotion on simulcast, and no label has ever asked not to be played on simulcast. *See* IHM FoF ¶¶ 138-144.

920. Mr. Burruss's testimony that Columbia does not devote any resources to promotion on simulcast also is not credible. *See also* IHM Response FoF ¶ 1175. Mr. Burruss himself submits DAIP requests to iHeartMedia, and he conceded on cross-examination that DAIP is a promotional program. *See* Tr. at 7066:17-19 (Burruss) ("Q. Just to direct you back to my question, Mr. Burruss, is DAIP a promotional program or not? A. I would have to say yes."). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

921. Mr. Walk's testimony that he does not specifically discuss simulcast when seeking promotion on terrestrial radio also is beside the point. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

922. This paragraph consists mostly of legal argument regarding the definition of simulcast. In addition, citing only Professor Rubinfeld, SoundExchange claims that “[a]ll indications suggest that [simulcast] functionality will continue to evolve over the five years at issue in this rate period.” Even if Professor Rubinfeld had made such a statement, it would not be reliable, because Professor Rubinfeld has no basis to testify about how simulcast services are evolving, which he did not study and cannot predict. *See* Tr. at 2022:5-8, 2153:10-15 (Rubinfeld) (neither Professor Rubinfeld nor Professor McFadden studied simulcast). In any event, the cited portion of Professor Rubinfeld’s testimony merely stated (without any support) that, in general, functionality is “constantly evolving.” Rubinfeld WRT ¶ 207. Such vague and unsupported statements cannot be credited, and in no case support SoundExchange’s specific claims with respect to simulcast functionality.

923. Simulcasts, under both NAB’s and iHeartMedia’s proposed definitions, have two distinctive features. *First*, they are one-to-many streams; every listener hears the same music, talk, and news at the same time. *Second*, a majority of the streamed content can be heard, at the same time, on a local terrestrial radio station. SoundExchange is therefore wrong that these definitions allow for “customization.” They do not. Even when services swap out ads or songs

from the terrestrial radio station broadcast, there is still only one simulcast and zero opportunity for personal “customization.” Every listener to the simulcast hears the same music, talk, and news at the same time.²⁶

924. Admitted.

925. SoundExchange mischaracterizes Mr. Littlejohn’s testimony. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

926-927. These paragraphs address iHeartMedia’s and NAB’s proposed definitions of the term “Broadcast Retransmission” to be included in the regulations. iHeartMedia’s position is that the statutory license rate should apply to both simulcast and custom webcast transmissions. *See* IHM CoL Part VII. iHeartMedia notes that NAB has proposed a rate solely for simulcast services and highlighted the record evidence showing the unique characteristics of simulcasting. *See* NAB FoF ¶¶ 35-118, 213-225, 230-242. Both iHeartMedia’s witnesses and NAB’s witnesses testified that rates for simulcast services in particular need to be re-set at an economically rational level. *See, e.g.,* IHM FoF ¶¶ 14-17; NAB FoF Part IV.

928. iHeartMedia refers the Judges to NAB’s response.

929. This paragraph contains lawyer argument, not proposed factual findings.

Moreover, there is no basis for SoundExchange’s claim that SongExchange or any other song

²⁶ The *ads* on simulcast will often differ from the ads on local terrestrial radio because: (a) the simulcast station may have national reach, while the terrestrial radio station targets a local community making the simulcast station more attractive to national companies and the terrestrial radio station more attractive to local companies; and (b) some ads are subject to licenses that limit their distribution to terrestrial radio.

replacement technology would or could be used to customize simulcast streams for each individual user.

930-938. iHeartMedia refers the Judges to NAB's response.

RESPONSE TO PART XI – AGREEMENTS WITH APPLE AND THE IILE SERVICES

939. This paragraph contains lawyer argument that Apple's agreements with Warner and Sony for the iTunes Radio service support SoundExchange's rate proposal. For the reasons set forth below, these agreements are not reliable either as benchmarks (and SoundExchange has not even offered them as such) or as corroborative evidence of SoundExchange's rate proposal.

940-942. These paragraphs contain assertions about the functionality of Apple's iTunes Radio service. Although SoundExchange suggests that the iTunes Radio service is a statutory service, that is contrary to how the record labels themselves understood the service at the time they entered into direct licenses with Apple. *See, e.g.*, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]; *see also* Fischel/Lichtman SWRT ¶ 10 n.21 [REDACTED]
[REDACTED]

[REDACTED]; IHM FoF ¶¶ 352-355.

943-944. Admitted.

945. This paragraph contains lawyer argument that any concerns about whether the interactive services market is “effective[ly]” or “workabl[y]” competitive do not apply in the

case of the Apple iTunes Radio agreements. For the reasons set forth below, such arguments are contrary to the evidence.

946-947. Professor Rubinfeld's pre-filed testimony provides no basis for SoundExchange's assertion that iTunes Radio has the same ability as Pandora or iHeartRadio to steer listeners toward the music of a particular label or that Apple would have possessed significant bargaining power in negotiations with the record labels. Professor Rubinfeld's testimony cites no evidence in support of such assertions, and none exists in the record. With respect to SoundExchange's claims concerning the nature of competition in the interactive services market, iHeartMedia refers the Judges to the responses of the other Services.

948. Professor Rubinfeld's pre-filed testimony does not support SoundExchange's argument that Apple wielded substantial bargaining power in its negotiations with the independent record labels. Professor Rubinfeld claims that the absence of [REDACTED] in these agreements is evidence of such bargaining power. Although Apple's agreements with Warner and Sony contained [REDACTED], they are not properly treated as webcasting royalties. *See* IHM FoF ¶ 382. Thus, the absence of [REDACTED] in Apple's deals with the independents is not evidence that the independents had less bargaining power than Warner or Sony. With respect to SoundExchange's other arguments concerning the relative bargaining power of Apple and the labels, iHeartMedia refers the Judges to the responses of the other Services.

949. This paragraph contains lawyer argument that Apple's agreements with Warner and Sony were not intended to be used as evidence in these proceedings. For the reasons set forth below, such arguments are contrary to the record.

950-953. Professor Shapiro's testimony that webcasters and labels generally negotiate direct licenses with the knowledge that they may be used in these proceedings provides no support for SoundExchange's claim that the Apple agreements were not intended to be used as evidence in these proceedings. Nor is SoundExchange correct that it is merely "speculation" that the Apple agreements would be used to try and influence the CRB: the evidence here shows that Apple and the labels s [REDACTED]

[REDACTED]

[REDACTED] See IHM FoF ¶¶ 359-362. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²⁷ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁷ In 2013, Apple was sued by the U.S. Department of Justice for conspiring with book publishers to raise consumer-facing e-book prices by eliminating retail price competition. The Second Circuit recently affirmed the district court's ruling against Apple, including the district court's determination that Eddy Cue had personally orchestrated price-increasing contracts with each of the implicated book publishers in an attempt to damage other retailers, such as Amazon. See *United States v. Apple, Inc.*, – F.3d –, Nos. 13-3741-cv *et al.*, 2015 WL 3953243, at *22-*23 (2d Cir. June 30, 2015).

[REDACTED]

[REDACTED]. There is accordingly no basis to SoundExchange's assertion that Apple and the labels' focus on these proceedings does not diminish their evidentiary value "any more than the Pandora-Merlin or iHeart benchmarks."

954. SoundExchange cites no evidence at all to support its assertion that Apple and the labels' consideration of the effect of these proceedings is "irrelevant" to the reliability of the Apple-Warner and Apple-Sony agreements, which is contradicted by record evidence. *See* IHM FoF ¶¶ 356-362.

955. This paragraph contains lawyer argument that [REDACTED]

[REDACTED]

[REDACTED]. For the reasons set forth below, such arguments are contrary to the record.

956. Although the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Fischel/Lichtman SWRT ¶ 36; IHM FoF ¶ 381.

Given the ambiguous evidence on this point, there is no basis for the Judges to accept SoundExchange's attempt to count [REDACTED] as part of the royalty payments.

957. This paragraph contains lawyer argument that the internal projection documents created by Apple and the labels treat [REDACTED] as applicable to the iTunes Radio service. For the reasons set forth below, such arguments are contrary to the record.

958-962. Relying solely on the testimony of Professors Katz and Shapiro, these paragraphs assert that [REDACTED]
[REDACTED]. But neither expert had a basis for asserting that any particular set of projections prepared by the parties describes their expectations at the time of the deal. *See, e.g.*, IHM FoF ¶ 374 n.21. Nor could they, since no Apple or record label witness testified as to which set of projections reflected the parties' actual expectations. Indeed, SoundExchange's description of the documents on which it relies as [REDACTED]
[REDACTED] is misleading, given that no fact witness testified as to the documents' authenticity, reliability, or significance. SoundExchange's argument also is wrong. It ignores evidence, as discussed above, that [REDACTED]
[REDACTED]. *See* Fischel/Lichtman SWRT ¶ 36; IHM FoF ¶ 381. It also ignores evidence that Sony and Warner themselves recognized the uncertainty and ambiguity in the Apple contracts regarding what portion of [REDACTED]
[REDACTED]
[REDACTED]. *See* Fischel/Lichtman SWRT ¶¶ 37-38; *see also, e.g.*, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]; IHM FoF ¶¶ 383-384.

963. This paragraph contains lawyer argument that the [REDACTED]
[REDACTED]. For the reasons set forth
below, such arguments are contrary to the record.

964-965. Admitted.

966-969. iHeartMedia admits that, through amendments to the labels' [REDACTED]
[REDACTED], the parties
agreed to recharacterize Apple's [REDACTED]
[REDACTED]. iHeartMedia disagrees, however, with the
inference SoundExchange seeks to draw from that evidence, which shows only that Apple and
the labels sought [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. See IHM FoF ¶¶ 380-384.

970-973. In responding to NAB's argument that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]. See IHM FoF ¶ 381.

974. SoundExchange cites no evidence at all to support its assertion in this paragraph that the [REDACTED]

[REDACTED]. The Judges, therefore, cannot accept this proposed finding. Moreover, even if it were true, as described above, SoundExchange's assertion would be irrelevant: the key question is

[REDACTED].
SoundExchange has provided no evidence that such treatment is appropriate. See IHM FoF ¶¶ 380-384.

975-976. These paragraphs contain lawyer argument that increases in Apple's other lines of revenue (such as downloads and device sales) as a result of the webcasting agreements can be disregarded when attempting to derive an effective per-performance rate from the agreements because they would lead to corresponding increases in *label* revenue. For the reasons set forth below, such arguments are contrary to the record.

977. Admitted.

978. No weight can be given to Professor Katz's supposed admission that Apple's Controller [REDACTED]

[REDACTED]. And Apple's witness was not made available at the hearing. In any event, [REDACTED]

[REDACTED]; Fischel/Lichtman SWRT ¶ 35 & n.67 [REDACTED]

[REDACTED]); IHM FoF ¶ 388.

979. In characterizing the incremental [REDACTED]
[REDACTED] SoundExchange ignores that Apple projected
it would earn [REDACTED]
[REDACTED], see Fischel/Lichtman SWRT ¶ 52 — [REDACTED]
[REDACTED]
[REDACTED]. See Rubinfeld
WRT App. 2b & 2c; IHM FoF ¶ 385.

980-982. This paragraph argues that the incremental download revenue Apple
expected to obtain as a result of the webcasting agreements should be disregarded because of
corresponding increases to the *labels*' share of download revenues. But SoundExchange ignores
evidence that shows the increased download revenues were necessary to Apple to offset the
expense of webcasting royalties, and that Apple would not have entered into the agreements
without such increases in other revenues. Although Apple expected to earn [REDACTED]
[REDACTED]
[REDACTED]. See
Fischel/Lichtman SWRT ¶ 52; [REDACTED]
[REDACTED]
[REDACTED]; see also IHM FoF ¶ 385; IHM CoL ¶¶ 21-22. In
fact, while Apple expected [REDACTED]

983. This paragraph contains lawyer argument that the rates in Apple’s agreements with Warner and Sony support SoundExchange’s rate proposal. For the reasons set forth below, such arguments are contrary to the record.

984-988. These paragraphs contain further legal argument. iHeartMedia refers the Judges to Part I of its Proposed Conclusions of Law and Part I of its Response to SoundExchange’s Proposed Conclusions of Law, which explain why expectations at the time parties entered into webcasting agreements — and not actual performance data — are the only reliable source of information about the rates a willing buyer and willing seller would agree to for webcasting performances.

989. In describing Professor Rubinfeld’s methodology as “conservative,” SoundExchange ignores iHeartMedia’s many criticisms of that methodology, including Professor Rubinfeld’s improper reliance on performance data in lieu of the parties’ expectations, his failure to make any adjustment for the statutory shadow, his failure to account for the possibility that preexisting payment obligations between Apple and the labels were merely recharacterized as new sources of revenue, and his failure to account for the possibility that new sources of revenue to Apple as a result of the agreements affected its willingness to pay. *See* IHM FoF ¶¶ 356-391.

990. In emphasizing that Professor Rubinfeld's calculation of an effective performance rate based on actual performance is [REDACTED], SoundExchange

ignores that the figures cited from [REDACTED]. As explained in Part I of iHeartMedia's Proposed Conclusions of Law and Part I of its Response to SoundExchange's Proposed Conclusions of Law, however, the relevant question is not what Apple actually paid under the agreements, but what it expected to pay at the time it entered into them. Indeed, this paragraph demonstrates the unreasonableness of SoundExchange's approach, which resulted in effective per-play rates for Apple of approximately [REDACTED] the rate Apple would have paid under the statutory rates.

991. In describing Professor Rubinfeld's adjustment to his per-performance rate to account for the difference in royalty-bearing plays [REDACTED],

SoundExchange ignores that Professor Rubinfeld improperly assumed that [REDACTED]

[REDACTED]. See IHM FoF ¶¶ 368-369; Fischel/Lichtman SWRT ¶¶ 43-44; [REDACTED]
[REDACTED]; Shapiro SWRT at 11-12; Fischel/Lichtman SWRT
Ex. B (IHM Ex. 3374 at 1). As described in iHeartMedia's Proposed Findings of Fact, [REDACTED]

[REDACTED]; IHM FoF ¶ 368.

992-993. In describing the "adjust[ment]" Professor Rubinfeld performed to account for independent labels, SoundExchange ignores that Professor Rubinfeld's treatment of the independent labels simply highlights the unprincipled nature of his rate calculation. Although the effective per-play rates he calculates for the independents differ markedly from those he

calculates for Sony and Warner, Professor Rubinfeld did not attempt to reconcile the figures; instead, when it came to these two major labels, he simply calculated a weighted average effective per-play rate for the majors and independents, assuming [REDACTED] for the independents, which had the effect of reducing his overall calculation for the Apple agreements by [REDACTED]. *See* IHM FoF ¶ 382; Rubinfeld WRT App. 2 ¶¶ 29, 41.

994-998. SoundExchange cites no evidence at all to support its assertions in these paragraphs regarding the proper treatment of skips and other non-royalty-bearing performances. The Judges, therefore, cannot accept these proposed findings which, in any event, are contradicted by record evidence. *See* IHM FoF ¶¶ 368-371.

999. In noting that properly accounting for skips and other non-royalty-bearing plays would reduce Professor Rubinfeld's rate calculation to [REDACTED], SoundExchange ignores the many other fatal flaws in Professor Rubinfeld's analysis of the Apple agreements, including his improper reliance on performance data in lieu of expectations, his failure to account for the effect of the statutory shadow, and his failure to account for revenue properly attributable to other lines of business. *See* IHM FoF ¶¶ 356-388.

1000. This paragraph contains lawyer argument that analyzing the parties' pre-deal expectations for the Apple agreements yields an effective per-play rate closer to SoundExchange's rate proposal than to the Services'. For the reasons set forth below, such arguments are contrary to the record.

1001-1004. These paragraphs purport to describe Sony and Warner's pre-deal expectations for the Apple iTunes Radio agreements. As noted above, however, SoundExchange ignores that no fact witness for any label described the label's expectations at the time the agreements were signed. SoundExchange's attempt to cast testimony by Professors Katz and

Shapiro as an endorsement of pre-deal models purportedly prepared by the parties for that purpose is a mischaracterization and, more importantly, cannot be given any weight: Professors Katz and Shapiro have no basis to identify any set of label projections as definitive in the absence of such evidence *from the labels*. See IHM FoF ¶ 374 n.21.

1005. This paragraph introduces SoundExchange's analysis of Apple's pre-deal expectations. No response is required.

1006-1008. Admitted.

1009-1014. iHeartMedia refers the Judges to Pandora's response.

1015. Some interactive services have offered quasi-noninteractive features in recent years. But it is undisputed that, because of the additional features they offer, these services do not and cannot rely on the statutory license. See IHM FoF ¶¶ 401-416; *accord* Rubinfeld WRT ¶ 179, [REDACTED]; Rubinfeld WRT ¶ 195, Tr. at 2086:8-12 (Rubinfeld) (Spotify Shuffle); Rubinfeld WRT ¶ 196 (Rhapsody unRadio); *id.* ¶ 199, Tr. at 2088:4-8 (Rubinfeld) (Nokia MixRadio).

Because of their premium features, use of these services' agreements with record labels as benchmarks would require adjustments to the headline per-play rates to create an apples-to-apples comparison. See Tr. at 2084:8-16 (Rubinfeld) ("If I was going to actually use [the Rhapsody unRadio agreements] as a[n] alternative suggested rate, I would have done some functionality adjustments."). But it is undisputed that no witness has even *attempted* such adjustments for any of the four "Section III.E" services. See *id.*; Tr. at 2086:3-6 (Rubinfeld) (Spotify Shuffle); Tr. at 2096:9-15 (Rubinfeld) (Beats The Sentence); Tr. at 2088:4-8 (Rubinfeld) (MixRadio). To the extent there is uncertainty about exactly what features the Section III.E services have, that is a product of SoundExchange's eleventh-hour reliance on them

as “corroborative” of Professor Rubinfeld’s interactive benchmark and their failure to offer fact witnesses regarding their functionality. Cf. Littlejohn WRT; [REDACTED]

[REDACTED]. In the absence of such evidence, there is no way the Section III.E services’ agreements can “corroborate” *any* claims about the noninteractive webcasting market.

Likewise, the four corners of the Section III.E services’ agreements themselves offer no assistance, as they are rendered inscrutable by a rat’s nest of blended rates and interlocking promises regarding unrelated products. See IHM FoF ¶¶ 417-421; Shapiro SWRT at 17; Katz WRT ¶ 265 (Spotify Shuffle); Fischel/Lichtman SWRT ¶ 27 & n.27 (Nokia MixRadio); *Id.* ¶ 30; Katz ¶ 240 & Table 12 (Beats’s The Sentence); Katz WRT ¶¶ 249, 259 & Table 14 (Rhapsody unRadio). [REDACTED]

[REDACTED]. Further confounding attempts to rely on the Section III.E services’ agreements to set rates is the fact that no witness even attempted to correct them to account for the shadow of the statutory rate. See Fischel/Lichtman SWRT ¶ 20.

Finally, SoundExchange suggests that record labels offer lower per-play rates for these quasi-interactive services because their agreements [REDACTED]. But there is no evidence in the record to support that assertion, as no fact witness testified regarding these agreements. Indeed, the [REDACTED] simply exacerbate a key problem with the Section III.E services: they were never intended as standalone products.

1016. SoundExchange impliedly concedes that the Section III.E services were not intended to operate as standalone services, but rather as avenues to convert listeners to interactive subscriptions. *See* SX FoF ¶ 1015. Many of these services represent only a small fraction of total spins on the service (including interactive offerings). *See* Katz WRT ¶ 240 & Table 12; *id.* ¶ 259 & Table 14. MixRadio was given away free to Nokia’s phone customers in order to sell more phones. *See* Katz WRT ¶ 249. And the free version of Beats’s The Sentence was always intended to be just a limited-time-only offer. *See* Rubinfeld WRT App. 1 at 3; *see also* Tr. at 2095:9-14 (Rubinfeld) (“[T]hat does suggest that the limited free service was shut down.”); Katz WRT ¶ 241 n.324 (“The source Dr. Rubinfeld cited for the existence of [the limited free version of The Sentence] stated that: ‘The company says that, for an unspecified period, it will make The Sentence free on iPhones.’”). Given these facts, it is unsurprising that these services’ agreements [REDACTED] — because they were never intended as standalone webcasting services.

1017. SoundExchange’s chief economic expert, Professor Rubinfeld, concedes that Beats’s The Sentence no longer exists, *see* Tr. at 2095:9-14 (Rubinfeld), and has [REDACTED]. The best evidence in the record — which is thin regarding *all* of the Section III.E services — suggests that The Sentence was a limited-time-only offering whose agreements contain [REDACTED] not suitable for use as benchmarks. *See*

Fischel/Lichtman SWRT ¶ 30; Katz WRT ¶ 241 & n.324; *id.* ¶ 240 & Table 12. SoundExchange asserts that the influence of a sophisticated third-party, AT&T, on Beats' rates renders them *more* reliable, but it offers no attempt to unbundle the interlocking promises between Beats, the record labels, and AT&T.

1018-1019. This problem is made worse by the fact that SoundExchange failed to submit fact testimony about The Sentence's functionality. The only evidence in the record about how The Sentence works in the real world was submitted by Mr. Littlejohn, who tested the Beats "free trial," which includes a version of The Sentence, and his testimony undermines any reliance on The Sentence as a corroborative benchmark because of the existence of "important features that exceed . . . the limits of the statutory license." Littlejohn WRT ¶ 11. Professor Rubinfeld, the SoundExchange witness who sought to rely on the Section III.E services, conceded that he never used The Sentence to play music. *See* Tr. at 2091:25-2092:5 (Rubinfeld) ("I didn't actually play any songs. One of the things I've done — actually, several times — is just go to various websites and look at the features of the service. I don't think I actually played a song."). SoundExchange offers no fact witness to patch this hole in the record.²⁸

In any event, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

28 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1020. It is irrelevant that the Beats agreement describes the limited-time-only version of The Sentence as [REDACTED]

[REDACTED]; Littlejohn WRT ¶¶ 11-15.

1021. The fact that The Sentence lacked certain features common in other streaming services demonstrates that it was never intended to operate over the long-term and that it was primarily designed as a teaser offering to induce customers to subscribe to Beats' subscription interactive product. *See* Katz WRT ¶ 241 & n.324; Tr. at 2095:9-14 (Rubinfeld).

1022. This paragraph is misleading. It is undisputed that waivers of the performance complement constitute modifications to the statutory license. *See* 17 U.S.C. § 114(j)(13). As such, they must be negotiated directly — though not all direct licenses contain such waivers. For example, [REDACTED]

[REDACTED]²⁹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. And it is undisputed that, despite conceding the existence of these additional features offered by Beats's The Sentence, SoundExchange made no attempt to adjust for their value. *See*

²⁹ [REDACTED]

Tr. at 2096:9-15 (Rubinfeld) (“Q. But you didn’t make any accommodation in your analysis for the possibility for any differences between what Beats is able to do and what the statutory license would allow, correct? A. I tried as best to describe the differences, but I did not do any calculations that would make an adjustment, that’s correct.”).

1023-1025. Professor Rubinfeld relied on the unadjusted headline rates described in the various amendments to Beats’s existing *interactive* licensing agreements to claim that those agreements “corroborated” his interactive benchmark. But he undertook no adjustment to correct for the [REDACTED], *see* Fischel/Lichtman SWRT ¶ 30, the additional functionality, *see id.* ¶ 11, or the shadow of the statutory rate, *see id.* ¶ 20; *see also* Tr. at 2096:9-15 (Rubinfeld) (“I did not do any calculations that would make an adjustment.”). As a result, the unadjusted headline rates contained in the Beats agreements are not probative. *See also* IHM FoF ¶¶ 404-408, 420, 422.

1026-1029. The rates applicable to Spotify’s free tier also do not corroborate SoundExchange’s rate proposal. Spotify Shuffle allows users to select the songs they want, to listen to when they want, so long as they do not specify the exact order of playback. *See* Littlejohn WRT ¶ 7. Users can “binge-listen” to their favorite artists, albums, or playlists. *Id.* Even Professor Rubinfeld admits that Spotify Shuffle “provides elements of interactivity.” Rubinfeld WDT ¶ 50 n.22. For many users, the requirement that the music be listened to in a random order is not a bug but rather a feature, because those users *prefer* shuffled playback. *See* Littlejohn WRT ¶ 10.

The additional interactivity Spotify includes with its Shuffle service was no accident. Instead, it was [REDACTED]

[REDACTED] *See* Fischel/Lichtman

SWRT ¶ 15 & Ex. A. This evidence demonstrates the substantial value that Spotify’s additional features have for consumers and, in turn, Spotify itself. Because it values the additional features, Spotify was willing to pay *more* for them.³⁰ But just as with the other Section III.E services, SoundExchange offers unadjusted headline rates, uncorrected for additional functionality, blended international rates, *see* Shapiro SWRT at 17, or the shadow of the statutory rate.

What evidence there is in the record suggests that the true per-play rate for Spotify Shuffle performances is [REDACTED]. *See* Katz WRT ¶ 269 & Table 17. Professor Katz calculated a per-play rate for Shuffle of [REDACTED] — *without* correcting for the additional functionality or the shadow of the statutory rate. *See id.* As a result, the unadjusted headline rates are not probative here.

1030. As with Beats and Spotify, Rhapsody unRadio is part of a more popular interactive product. It offers a subset of the features offered in Rhapsody’s fully on-demand product, including substantial interactivity. *See* Rubinfeld WDT ¶ 60 (“Rhapsody introduced ‘unRadio’ in 2014, which is an entirely separate product with its own subscription plan which offers curated radio playlists as well as unlimited skips, no advertisements, and caching of selected songs.”).

unRadio offers numerous non-statutory features, including, as noted, unlimited skips. *See* Littlejohn WRT ¶ 17. unRadio also announces songs in advance — in fact, pre-announced songs can even be *removed* from the play queue in advance — and it offers fast-forwarding and rewind functionality, full offline playback, and even on-demand playback of songs. *See id.* ¶¶ 17-18, 20-21. Again, SoundExchange made no adjustment for any of these features.

³⁰ The fact that Spotify offers a “radio” feature does nothing to diminish the additional features that remain available to Shuffle users.

Moreover, unRadio represents just [REDACTED], *see* Katz WRT ¶ 259 & Table 14, raising the concern that rates could be blended with Rhapsody's much larger existing interactive service, rendering the headline rate unreliable.

1031-1033. At its launch, Nokia MixRadio was offered exclusively to consumers who purchased Nokia mobile devices. *See* Rubinfeld WRT ¶ 199. An important part of the licensing agreements governing MixRadio is a [REDACTED]. *See id.* ¶ 200. But despite acknowledging those [REDACTED], Professor Rubinfeld undertook no attempt to account for the additional revenue Nokia received from mobile device sales as a result of its offering of MixRadio. *See id.* ¶¶ 199-200.

Moreover, MixRadio offers considerable extra-statutory functionality. *See* Littlejohn WRT ¶¶ 24-25. Professor Rubinfeld admitted that MixRadio offered such functionality, including offline playback and unlimited skips,³¹ *see* Rubinfeld WRT ¶ 199, but did not undertake any adjustments to account for them. As a result, the MixRadio agreements are not evidence of what a willing buyer and willing seller would agree to in the market for statutory services.

RESPONSE TO PART XII – WSA SETTLEMENT AGREEMENTS

1034-1081. iHeartMedia refers the Judges to NAB's and Sirius XM's responses.

RESPONSE TO PART XIII – DIGITAL RADIO PROMOTES

1082-1088. These paragraphs contain legal argument, not proposed factual findings. SoundExchange, moreover, is wrong to contend that the statute permits the Judges to consider

³¹ SoundExchange notes that some of these features require an additional monthly fee. That is irrelevant to the question of whether the royalties paid by Nokia ([REDACTED]) are for substantially the same performance rights as are available under the statutory license. The additional functionality available to MixRadio subscribers is therefore critical to understanding the necessary but unperformed adjustments to the headline rates.

only so-called “expansionary promotion” that benefits copyright holders as a whole, while excluding so-called “diversionary promotion” that benefits only individual record labels. Instead, the willing-buyer willing-seller standard requires the Judges to take into account promotional benefits that one record label may achieve at the expense of other record labels, as well as promotional benefits that accrue to the record label through increased consumer expenditures on music as a whole. *See* IHM CoL Part III; IHM Response CoL Part III. Moreover, the record evidence unequivocally establishes that the sellers here — from Warner to the thousands of independent labels that signed deals either with iHeartMedia or opted into the Pandora-Merlin Agreement — would seek greater promotion for themselves at the expense of other labels, and would agree to a lower rate in exchange for that promotion. *See* IHM FoF Part II.D.

1089-1090. This paragraph claims that consideration of so-called diversionary promotion under the statute “also is wrong from an economic perspective,” but SoundExchange neither explains nor supports that view. SoundExchange merely reiterates its views about what the statute means, which is wrong for the reasons described above. *See* IHM Response FoF ¶¶ 1082-1088.

1091. iHeartMedia admits that promotion is relevant to the downward adjustment that would need to be applied to the interactive benchmark if the Judges were to use that benchmark. For the reasons described above, *see* IHM Response FoF ¶¶ 1082-1088, iHeartMedia disagrees with SoundExchange’s claim that an adjustment is appropriate only for so-called expansionary promotion.

1092-1096. These paragraphs merely summarize the sections that follow, and any factual contentions in those sections are addressed below.

1097. This paragraph quotes *Webcasting III*. No response is required.

1098. This paragraph argues that, if statutory and interactive services were shown to have the same net promotional effect, there would be no need for a downward adjustment to the interactive benchmark to account for promotion. The evidence shows, however, that the net promotional effect for statutory and interactive services is very different, that there also are numerous other adjustments that must be made to the interactive benchmark, and that the interactive benchmark should therefore be discarded particularly given the thick market of agreements for statutory services. *See* IHM FoF Parts V.A-C, E, G, I.

1099. This paragraph acknowledges that the iHeartMedia-Warner and Pandora-Merlin agreements incorporate the parties' understandings of the promotional effects of those deals, but argues that those understandings are not necessarily representative of "the market's" view. SoundExchange cites no evidence that there is a difference between these parties' views and the market's view of promotional effects, or that the views of these parties are somehow idiosyncratic or not representative. To the extent SoundExchange is merely reiterating its legal argument that only "expansionary promotion" may be considered under the statute, it is wrong for the reasons described above. *See* IHM Response FoF ¶¶ 1082-1088.

1100. SoundExchange cites no evidence to support the claims in this paragraph, which are simply lawyer argument. The Pandora-Merlin Agreement necessarily represents terms that willing buyers and sellers would reach, including reasonable accounting for promotional effects. *See also* IHM Response FoF ¶ 1099.

1101. Although SoundExchange claims that [REDACTED]
[REDACTED] the testimony it cites, [REDACTED]
is to the contrary. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

1102. SoundExchange cites no evidence in this paragraph, which is simply lawyer argument. As noted above, there is no evidence that the entrants into direct licenses with iHeartMedia and Pandora — which all agreed to very low rates for additional spins on noninteractive services based on the promotional value of those spins — had idiosyncratic or nonrepresentative views. *See* IHM Response FoF ¶ 1099. SoundExchange cannot now invent such facts, which the record does not support.

1103. Citing only the testimony of Mr. Wilcox, SoundExchange argues that Warner did not view its agreement with iHeartMedia as providing promotional benefits. Mr. Wilcox's testimony is not credible. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Mr. Wilcox's testimony also is contradicted by numerous record label witnesses [REDACTED]

[REDACTED]

[REDACTED]. *See* IHM FoF ¶¶ 128-132. Mr. Wilcox's testimony also is at odds with Warner's own documents, which show that Warner [REDACTED]

[REDACTED]

[REDACTED] *See* IHM FoF ¶¶ 133-

137; [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

1104. SoundExchange cites no evidence in this paragraph, which is simply lawyer argument that is unsupported by the record for the reasons set forth above.

1105. SoundExchange argues that internal iHeartMedia and Pandora documents show [REDACTED]
[REDACTED]
[REDACTED].

As discussed above, however, neither document is evidence that consumers perceive statutory services and interactive service as competitive substitutes. *See* IHM Response FoF ¶¶ 286-287, 297-301. The overwhelming evidence demonstrates they do not. *See* IHM Response FoF ¶¶ 257-268; IHM FoF ¶¶ 28, 299-310.

1106. iHeartMedia refers the Judges to Pandora's response.

1107. Mr. Pittman's testimony that it is iHeartMedia's strategy to make its service available on multiple devices provides no support for SoundExchange's claim that webcasting is diverting revenues from other sources, and in fact shows the opposite. *See* Pittman WDT ¶ 9. As discussed above, iHeartRadio is siphoning customers away from other forms of listening that generate little or no revenue for copyright holders, primarily terrestrial radio, but also piracy and YouTube. *See* IHM Response FoF ¶¶ 237-243; IHM FoF ¶ 29. There is no evidence that iHeartRadio or statutory services in general are cannibalizing other sources of music industry revenue. *See* IHM Response FoF ¶¶ 226-231; IHM FoF ¶¶ 79-85. Thus, the more that

iHeartRadio expands, the more revenues that record labels are likely to earn. *See* IHM FoF ¶¶ 93-95.

1108. iHeartMedia refers the Judges to Pandora's response.

1109-1110. This paragraph attempts to use testimony and documents from iHeartMedia to show that statutory services substitute for interactive services. But none of this evidence addresses the critical question of how consumers view these services, and in any case SoundExchange has mischaracterized the record. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] SoundExchange claims that this testimony reflects a "newly changed opinion," but there is no evidence that Mr. Pittman ever held a prior contrary view; his testimony instead makes clear that when he previously used the term [REDACTED] to describe Pandora he had a different conception of that term from the one SoundExchange urges. Mr. Pittman's e-mails and the other iHeartMedia documents that SoundExchange cites confirm this.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1111. iHeartMedia refers the Judges to Pandora's response.

1112. SoundExchange contends that "as statutory webcasting services have gained in popularity, music industry revenues have continued to decline." But correlation is not causation and, as SoundExchange's own experts and fact witnesses conceded, there is literally no evidence of a causal link between these two trends. *See* IHM Response FoF ¶¶ 226-231; IHM FoF ¶¶ 83-84. All empirical evidence is to the contrary: the decline in revenues is due to factors other than webcasting, and webcasting is, if anything, helping to reverse the industry's decline in revenues. *See* IHM Response FoF ¶¶ 226-231; IHM FoF ¶¶ 28-29, 79-85.

1113. This paragraph attempts to credit the Apple iTunes Store — not statutory webcasting — with reducing piracy. But SoundExchange's sole support is a paragraph of testimony from Dr. Blackburn, who is not an expert on these matters, and whose testimony cites a few publications that loosely link the iTunes Store with Napster and other unspecified "free" services. *See* Blackburn WRT ¶ 57. In any event, iHeartMedia's witnesses and experts did not claim that webcasting eliminated piracy, but rather that it has been recognized by the record labels themselves as converting listeners from piracy and is the best hope of continuing to thwart that threat going forward; there is vast record support for this contention. *See* IHM Response FoF ¶¶ 237-243; IHM FoF ¶¶ 29, 32, 46.

1114. SoundExchange ignores independent studies that have found that download sales will stay flat going forward, as well as record label testimony that streaming revenues are growing fast enough to offset any decline in digital downloads. *See* IHM Response FoF ¶ 232.

1115-1119. These paragraphs describe Dr. Blackburn's supposed "natural experiment" regarding the iHeartMedia-Warner Agreement. Dr. Blackburn's analysis is not reliable, and in no case supports SoundExchange's thesis that statutory webcasting services are net substitutional — a proposition that Dr. Blackburn did not even try to test. *See* Blackburn WRT ¶¶ 25-27 (explaining that experiment was designed to test solely whether additional performances result in additional sales); Tr. at 5987:24-5988:14 (Blackburn) (testifying that the "natural experiment" is not affirmative evidence of substitution, but rather "just further lack of evidence of a promotional effect").

First, Dr. Blackburn compared Warner's share of plays on iHeartRadio's custom radio stations to Warner's share of all album sales nationwide during the first six months of the iHeartMedia-Warner Agreement; he did not explain why he ignored iHeartRadio's simulcast radio stations, which account for the majority of listening on iHeartRadio, or why he limited his analysis to a six month period when data for subsequent months was available. *See* Blackburn WRT ¶¶ 25-26 & Figure 6; [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Dr. Blackburn's

failure to consider these factors makes it impossible to draw any conclusion as the cause of the dip in Warner's share of album sales. Indeed, Dr. Blackburn conceded that [REDACTED]

[REDACTED], or "other changes going on in the market," Tr. at 5986:2-18 (Blackburn), might explain the dip in Warner's share of album sales. Even if it were possible to draw some conclusion, one could not do so with any level of confidence. Dr. Blackburn admitted he failed to apply the very scientific principles that he used in other contexts in order to prove cause and effect and could not assign any level of statistical confidence to his conclusions. *See* Tr. at 5986:20-5988:21 (Blackburn) (admitting he did not calculate a p-value even though it would be possible to do so).

Second, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1120. SoundExchange relies for the factual claims in this paragraph not on testimony from artists or copyright owners, but from record label lawyers and deal negotiators who, like SoundExchange itself, are charged first and foremost with obtaining the maximum possible rate. *See* IHM FoF ¶¶ 87-88. The views of these witnesses cannot be considered representative of “copyright owners” generally, or even of the record labels as a whole. *See id.* ¶¶ 89-95. Moreover, SoundExchange’s suggestion that promotion has become an anachronism because consumers are purchasing less is demonstrably false. *See* IHM FoF ¶¶ 100-144; IHM Response FoF ¶¶ 237-243.

1121. This paragraph claims that statutory services compete directly with and therefore lead consumers to shun higher-priced interactive services. But SoundExchange’s only support is Mr. Kooker, a record company negotiator, who is not a credible witness on consumer demand. He has no expertise or even first-hand knowledge of what consumers of *webcasting* — a business he is not even in — may or may not want, or what their incentives are. Mr. Kooker’s testimony is not merely unreliable but wrong. The evidence conclusively shows that only a small number of consumers are willing to pay \$120 per year for music (the annual cost of a \$9.99 per month interactive service), which is one of several core factors that deter consumers from migrating to paid versions of directly licensed services. *See* IHM Response FoF ¶ 244.

1122. This paragraph claims that the availability of statutory services makes it more difficult to persuade consumers to buy music. SoundExchange cites only Mr. Kooker and Mr. Harrison, but neither is a credible witness about consumer demand and purchasing habits. SoundExchange has offered no reliable evidence that use of statutory webcasting is causing decreases in music purchases, and its witnesses have conceded they have no causal proof of such an effect. *See* IHM Response FoF ¶¶ 226-231; IHM FoF ¶¶ 28-29, 79-85.

1123-1124. These paragraphs contain snippets of testimony from independent label witnesses, one artist, and one artist representative making claims similar to those of Mr. Kooker and Mr. Harrison. But like Mr. Kooker and Mr. Harrison, none of these witnesses can reliably testify about the behavior of webcasting consumers. And for the same reasons described above, none of this testimony is evidence that there is substitution between statutory and interactive services occurring in the marketplace.

1125. Under a heading purporting to describe “survey evidence,” SoundExchange claims that “every moment” a statutory service is used it displaces use of an interactive service. SoundExchange’s only support is Mr. Kooker, who did not perform any survey or even claim to review one, and is not a credible witness on consumer behavior. SoundExchange’s claim also is wrong: listening to statutory services is most likely to replace listening to terrestrial radio, and is therefore most likely to be a net benefit not net substitute to record industry revenues. *See* IHM Response FoF ¶¶ 237-243; IHM FoF ¶¶ 29, 93-95.

1126. Citing only Mr. Wheeler, SoundExchange claims that webcasters have economic incentives to discourage their users to pay for subscriptions. *See* Wheeler WDT at 19. Mr. Wheeler has no basis to testify about the economic incentives of webcasters. Moreover, as demonstrated above, the evidence conclusively shows that statutory webcasting does not prevent consumers from paying for subscription services, but instead is viewed by consumers as a distinct product. *See* IHM Response FoF ¶¶ 257-268; IHM FoF ¶¶ 28, 299-310.

1127-1131. These paragraphs describe the survey by Sarah Butler, which SoundExchange cites as further evidence that consumers would use interactive services in the absence of statutory services. But Ms. Butler’s survey did not purport to measure quantitatively the actual or likely future substitution between statutory and interactive services, and also is

flawed for at least two reasons. *See* IHM FoF ¶¶ 304-306. Ms. Butler — in contravention of standard survey procedure — failed to conduct a pre-test to determine whether the questions posed in her survey were understandable to respondents; and her survey did not attempt to answer important questions, such as consumer willingness to pay, that are critical to her ultimate conclusion that “statutory webcasting services are substitutes for on-demand services,” rendering the survey disconnected from the real-world marketplace. *See id.*

1132-1140. iHeartMedia refers the Judges to Pandora’s response.

1141. This paragraph acknowledges that Dr. Kendall’s empirical study found that statutory services are net promotional, but claims that Dr. Blackburn reached the opposite conclusion. In fact, Dr. Blackburn’s empirical results also show that statutory services are net promotional and corroborate Dr. Kendall’s conclusion. As Dr. Blackburn conceded on cross-examination, the best estimate of the effect of statutory services on music sales is the point estimate, which he admitted was positive in his study. *See* Tr. at 5978:23-5979:22 (Blackburn) (“I mean, I guess if you put a gun to my head and said you have to pick a number, that’s [the point estimate] the best estimate . . . I agree that’s a positive number.”). Thus, his data show that users of statutory services “purchased 5.123 more downloads — more song downloads in period 2” (a three-month period) when they started listening to statutory services, than they did in period 1 (another three-month period) when there was no such listening. Tr. at 5980:11-16 (Blackburn) (“That’s the interpretation, yes.”). In the same model, Dr. Blackburn’s study showed that users of interactive services purchased 3.838 fewer downloads in period 2 than in period 1. *See* Tr. at 5981:22-5982:4 (Blackburn).

1142-1143. SoundExchange claims that, because the data used by Dr. Kendall and Dr. Blackburn are limited only to downloads (not physical sales) and desktops (not mobile devices)

they do not measure “the overall *net* promotion/substitution effect.” But the main purpose of these studies is to determine the *difference* in the net promotional effects of statutory and interactive webcasting. *See* Kendall WRT ¶ 5; Blackburn WRT ¶ 43. Although the studies also quantify the net promotional effect of each service, there is no evidence that including only downloads in the study biases the results. *See* IHM FoF ¶ 149; Kendall WRT ¶ 14. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1144. This paragraph describes Dr. Kendall’s study and broadly concludes that it is “deeply biased and cannot be credited.” Dr. Kendall’s study is, in fact, reliable and provides sound empirical evidence demonstrating that statutory webcasting services are more promotional than interactive services. The study is based on the most robust dataset of its kind, which was obtained from a source that is used widely and viewed as reliable by thousands of businesses. *See* Kendall WRT ¶ 7. The data consist of 60,000 observations that track 10,000 users over a six-month period. *See id.* ¶ 8. This evidence is sufficiently reliable that the Judges cannot simply apply the interactive benchmark without adjusting for the differential promotional effect between these two types of services. *See id.* ¶¶ 25-35. Dr. Kendall not only satisfactorily addressed all of SoundExchange’s criticisms, but SoundExchange’s own expert, Dr. Blackburn, used data from the same source and containing all the same issues, and believed the data reliable enough to conduct an empirical study of his own, without voicing any of the criticisms that SoundExchange’s lawyers now belatedly try to make. *See* Blackburn WRT ¶¶ 46-50

(identifying “Limitations of the iHeartMedia Data,” but discussing only the shortcomings of measuring music “discovery” as opposed to time listening, which does not apply to Dr. Kendall’s data set, as discussed at IHM Response FoF ¶ 1159). SoundExchange’s inability to challenge Dr. Kendall’s testimony on the record as it exists is further illustrated by its attempt to submit with its proposed findings of fact an entirely new analysis that “reruns” Dr. Kendall’s data. That new analysis is improper and unreliable. SoundExchange not only fails to provide any of the materials necessary to validate its new analysis, but the limited materials it does provide also are incomplete or wrong on their face, as discussed further below.

1145-1147. SoundExchange claims that Dr. Kendall’s study is unreliable because the underlying data show a gap between the time spent listening to interactive as compared to statutory services. As Dr. Kendall testified, however, this disparity “seemed reasonable” and “there’s other evidence that points in that direction.” Tr. at 3275:13-15 (Kendall). For example, it makes sense that interactive listening time would be higher because interactive listeners tend to be intensive music listeners who more frequently pay for the service, and therefore have an incentive to use the service more intensely. *See, e.g.*, Tr. at 3274:17-21 (Kendall); [REDACTED]

[REDACTED]

[REDACTED]

SoundExchange claims that data from Professors Fischel and Lichtman show that Pandora users exhibit more intense listening than Spotify users, but that data look only at the limited subset of Pandora users that are paid subscribers, which comprises a very small share (4 percent) of Pandora’s total listener base who likely listen to more music than the average Pandora subscriber given that they have chosen to pay for the service. *See* Fischel/Lichtman WRT ¶ 61; *see also* IHM Response FoF ¶ 254. Mr. Herring’s testimony also provides no basis to question Dr.

Kendall's data; [REDACTED]
[REDACTED]
[REDACTED].

1148. This paragraph speculates that the time spent listening using applications (as opposed to a web browser) is overstated because listening on applications is measured based on the time the application is open. But there is simply no evidence that users leave applications open when they are not using them to listen to music, and therefore no basis to believe that these data overstate listening time to any meaningful degree. As Dr. Kendall testified, the fact that these data are considered reliable in the industry suggests that this is not a valid concern. *See* Tr. at 3310:12-22 (Kendall). Indeed, Dr. Blackburn also relied on application data and believed his results were reliable, without raising any questions about these data or this issue. *See* Blackburn WRT ¶¶ 46-50.

1149. This paragraph claims that including application data biases Dr. Kendall's results based on further speculation that Spotify is accessed more widely using an application than Pandora, thereby inflating listening time on Spotify vis-à-vis listening time on Pandora. SoundExchange provides no evidence of this. The cited testimony of Dr. Kendall states only that the Spotify application is popular; it does not compare that popularity with the Pandora application. *See* Tr. at 3305:11-23 (Kendall). In any event, as discussed above, there is no basis to believe that the time the Spotify application is open on a desktop is materially out of line with the time Spotify is actually being used to listen to music, and the fact that these data are considered reliable in the industry suggests that this is not a valid concern. *See* IHM Response FoF ¶ 1148; Tr. at 3310:12-22 (Kendall).

1150. This paragraph claims that Dr. Kendall's data further overstate listening to Spotify because "the default setting on the Spotify app is to launch (*i.e.*, to open) once the computer is turned on." But as Dr. Kendall explained, just like any program that runs at start-up by default, users can easily change that default and remove Spotify from the start-up folder. *See* Tr. at 3306:19-23 (Kendall) ("So as I understand it, you can — if the Spotify app or Pandora app or whatever app is in your start-up folder, it will start up when you turn on the computer; and if it's not in the start-up folder, then it won't."). Moreover, even when Spotify opens, users can close the app, and there is no evidence to suggest users fail to do so when they are not using Spotify to listen to music. As Dr. Kendall testified, the fact that these data are considered reliable in the industry suggests that this is not a valid concern. *See* Tr. at 3310:12-22 (Kendall).

1151-1152. These paragraphs describe an entirely new analysis prepared by SoundExchange's lawyers that purports to "rerun" Dr. Kendall's study "excluding the app data" that SoundExchange wrongly contends biases Dr. Kendall's results. This new analysis is not part of the record, is not sponsored by any witness, has not been fully disclosed, and should therefore be disregarded as improper. It is probative only to show the inability of SoundExchange to challenge Dr. Kendall's study on the record that actually exists. In any event, SoundExchange's supposed "recreation" of Dr. Kendall's analysis also is clearly flawed. It classifies thousands of listeners (those who use an app instead of a web browser) as non-listeners, and therefore artificially decreases the promotional effect from listening because those listeners' purchases are attributed to non-listeners. This new analysis also is incomplete, which makes it impossible to verify SoundExchange's methodology or its implementation of that methodology. For example, the table that SoundExchange proffers as "a recreation of Dr. Kendall's Exhibit H," contain the references in the first two rows "From Exhibit F" and "From

Exhibit G,” but the reported numbers appear nowhere on Dr. Kendall’s Exhibits F and G; if SoundExchange recreated its own versions of Exhibits F and G, it has not provided them. SoundExchange’s analysis also omits any tests for statistical significance of its new results. This is of particular concern because, by removing all listening that occurred on applications, the sample size is reduced significantly. For example, a comparison of Dr. Kendall’s Exhibit C with SoundExchange’s recreated Exhibit C shows that the number of non-interactive and interactive listeners has been reduced by nearly 25 percent, from 17,106 observations in Dr. Kendall’s study to 13,082 in SoundExchange’s purported recreation

1153. This paragraph contains unsupported lawyer argument. No witness or any other evidence suggests that when desktops are used to listen to and purchase music, it is different members of the same household engaging in these two activities. As Dr. Kendall testified, the fact that these data are considered reliable in the industry suggests that this is not a valid concern. *See* Tr. at 3310:12-22 (Kendall).

1154. This paragraph claims that Dr. Kendall’s data are demographically unrepresentative, but SoundExchange offers no evidence that this is the case. As Dr. Kendall testified, the data sample reflects a very wide demographic. *See* Tr. at 3217:15-21 (Kendall) (“And so, you know, certainly we looked at the demographics of the people in the sample, and it’s a very broad range of income class, in terms of both genders, in terms of, you know, age — age range. And so I don’t think there’s anything that’s specifically oddball about the data in that sense.”). Moreover, any issues regarding the representativeness of the data affect both statutory and interactive services equally, and therefore do not affect Dr. Kendall’s conclusions regarding the relative promotional effect between these services. *Cf.* Blackburn WRT ¶ 50 (noting with respect to a different data issue that “these biases are likely similar for interactive and non-

interactive services. As such, the comparison of the estimated promotional effect of interactive services with that of non-interactive services can be made”).

1155. This paragraph alleges that Dr. Kendall’s “machines are not selected randomly,” but that Dr. Kendall “could only obtain 8,000 machines that streamed music, so he chose to include another 2,000 machines that did not stream but instead purchased downloads.” This is unsupported lawyer argument that also is incorrect. To ensure there were enough purchasing data in the sample, Dr. Kendall requested that at least 2,000 of the 10,000 machines include purchasing data. Those 2,000 machines also include listening data. *See* Kendall WRT ¶ 11 & n.16 (“These 2,000 machines in some cases may also have listened to online streaming services (and would be recorded as having done so in the data), but they are not in any case duplicates of any of the 8,000 machines selected on the basis of listenership.”). In any case, any issues with the data affect interactive and statutory services equally, and therefore do not affect the results regarding the relative promotional effect of these services. *Cf.* Blackburn WRT ¶ 50.

1156. This paragraph criticizes Dr. Kendall’s use of data for Google, Apple, and Amazon, because the websites that allow music listening and purchasing also allow other activities. For that very reason, Dr. Kendall ran his study both with and without these services. As he testified, the exclusion of these data is not necessarily warranted, but even if they are excluded, there is no change in the key result that statutory services have a materially larger promotion effect, relative to interactive services. *See* Kendall WRT ¶¶ 24, 32.

1157. This paragraph responds to Dr. Kendall’s testimony that the widespread use of his data including in the music industry helps confirm its reliability. In arguing that “[j]ust because the data may be reliable for certain uses does not mean that Dr. Kendall’s particular study is immune from critique,” SoundExchange confuses the reliability of the underlying data with Dr.

Kendall's methodology for analyzing them and the conclusions he draws. There can be no serious dispute that the data reliably track what they are intended to track. All of SoundExchange's criticisms relate to how Dr. Kendall has characterized or used the data. As discussed above, these criticisms do not provide a valid basis to set Dr. Kendall's analysis aside.

1158. This paragraph claims that Dr. Kendall's study does not have probative value because he did not report the statistical significance between the differential effect of statutory and interactive services. This, too, mischaracterizes what Dr. Kendall did and the validity of his approach. Dr. Kendall performed the standard tests of statistical significance, all of which provided confidence in the validity of his results. *See* Kendall WRT ¶¶ 19, 23-24; Tr. at 3228:20-3235:14 (Kendall). Although there are always additional tests that can be performed in any study, these additional tests were not necessary or as meaningful as those he did perform, as Dr. Kendall explained in his declaration filed in response to SoundExchange's failed motion to exclude Dr. Kendall's testimony. *See* Decl. of Todd Kendall (Apr. 6, 2015). Moreover, Dr. Blackburn recognized that, even if Dr. Kendall had performed the additional tests SoundExchange now claims are appropriate, the results indicate 94 percent certainty in the conclusion that statutory services promote more than interactive services. *See* Decl. of David Blackburn ¶ 6 (Mar. 31, 2015).

1159. This paragraph attempts to distinguish Dr. Blackburn's study from SoundExchange's criticisms of Dr. Kendall. Dr. Blackburn groups all users into two groups: listeners and non-listeners. He draws no distinction between listeners who listen for short amounts of time and listeners who listen for long amounts of time in measuring promotional effect. *See* Blackburn WRT ¶ 40. Dr. Kendall, by contrast, distinguishes among such listeners, recognizing that greater amounts of listening results in greater exposure to music which is likely

to influence purchasing behavior. *See* Kendall WRT ¶¶ 15, 16, 19. Dr. Kendall's approach therefore uses more of the available data, and unsurprisingly yields more statistically significant results than Dr. Blackburn's approach. Moreover, SoundExchange offers no evidence or other basis to conclude that any of the issues it has raised with respect to the underlying data used in both studies would bias Dr. Kendall's results but not Dr. Blackburn's.

1160-1161. These paragraphs summarize Dr. Blackburn's conclusion that he found no statistically significant difference between the promotional effect of statutory and interactive services. But this conclusion cannot be credited in light of Dr. Blackburn's admission that the point estimates are "the best estimate of an unknown parameter," and Dr. Blackburn's point estimates — as discussed above — show a positive promotional effect for statutory services, and a greater promotional effect for statutory services than for interactive services. *See* IHM Response FoF ¶ 1141. The fact that Dr. Blackburn's positive results do not show statistical significance at the 95-percent level does not mean that they can simply be ignored, particularly since they point in the same direction as Dr. Kendall's study, which finds higher levels of certainty using more of the available data. It is simply not credible that chance explains Dr. Blackburn's results, when Dr. Kendall and Dr. Blackburn — and Dr. McBride — all came to similar conclusions based on separate analyses and separate data.

1162-1168. iHeartMedia refers the Judges to Pandora's response.

1169-1170. Citing only the testimony of Ms. Fowler, this paragraph argues that record labels are promoting on interactive services like Spotify, but not statutory services like Pandora. But Ms. Fowler provides no data or other evidence to support these assertions, *see* Fowler WRT ¶¶ 12-13, 15, which are contradicted by extensive record evidence. The direct deals that iHeartMedia and Pandora have signed with Warner and independent labels demonstrate the

demand for promotion on statutory services. *See* IHM FoF ¶¶ 101, 127-137. Moreover, the record labels' other conduct, including their internal documents, shows that statutory services are promotional, as iHeartMedia has demonstrated at length. *See id.* ¶¶ 138-144.

1171-1172. SoundExchange claims that traditional promotion is incompatible with services that use computer algorithms rather than live programmers to select music. As discussed above, however, this statement is contradicted by extensive record evidence demonstrating that the record labels *are* seeking promotion on algorithm-based services. *See* IHM Response FoF ¶ 1170; IHM FoF ¶¶ 101, 127-44. There is, to the contrary, no evidence that record labels have attempted to discourage noninteractive services from featuring their music in their algorithms. *See* IHM FoF ¶ 166.

1173. This paragraph characterizes the numerous marketing promotion plans in evidence as containing "only scattered references" to webcasting, but SoundExchange does not cite a single plan to support this assertion. As iHeartMedia demonstrated, these plans confirm that the record labels have used their promotion departments to influence the songs that noninteractive services play on simulcast and "custom" radio. *See* IHM FoF ¶ 138. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] No weight should be given to Mr. Burruss's testimony that simulcast does not come up in marketing, *see* Tr. at 7045:2-5 (Mr. Burruss), because Mr. Burruss oversees promotion on terrestrial radio and it is plainly the case that efforts to promote on terrestrial impliedly include simulcast, whether or not they are separately called out. *See* IHM FoF ¶¶ 138-143.

1174. This paragraph claims that certain artists and sound recordings have broken without substantial airplay, but that is irrelevant. The record labels clearly view such airplay to be sufficiently critical to have in-house promotion departments, with, collectively, hundreds of employees, and to spend hundreds of millions of dollars annually — a substantial portion of their overall budgets — on obtaining such promotion. *See* IHM FoF ¶¶ 103-104. Mr. Burruss’s unsupported anecdotes of a few albums that sold well despite no significant prior airplay (Burruss WRT ¶ 10) are the exceptions that prove the rule and deserve little weight in light of the extensive evidence that record labels invest heavily in promotion, and must therefore view it as important in today’s marketplace.

1175. This paragraph argues that iHeartMedia’s promotional programs like AIP, On the Verge, and DAIP are advertisements. While these programs often — but do not always — include a “where to purchase” message, they are no more advertisements for artists and songs than ordinary radio play and artist interviews. *See, e.g.*, Tr. at 1306:2-19 (Wheeler) (DAIP spot for Queens of the Stone Age’s “Smooth Sailing” included “pretty much the whole track,” but did not include a “where to purchase” message). Because iHeartMedia plays the entire song or nearly the entire song as part of the On the Verge and DAIP programs, those plays are indistinguishable from ordinary plays from the perspective of listeners. *See* IHM FoF

¶¶ 120, 140 & n.17. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

There also is no merit to Mr. Burruss's testimony that "Columbia Records spends no resources to promote its artists to DAIP," Tr. at 7050:6-11, which is contradicted by Mr. Burruss's own submission of numerous songs to iHeartMedia for consideration for the DAIP Program. *See* IHM FoF ¶ 141. This is the *only* way for Columbia Records to "promote its artist to DAIP" and it is undisputed that Columbia Records takes advantage of this opportunity. Mr. Burruss also admitted that DAIP is a promotional program. *See* Tr. at 7066:17-19 (Burruss) (Q. Just to direct you back to my question, Mr. Burruss, is DAIP a promotional program or not? A. I would have to say yes."). [REDACTED]

[REDACTED]

1176. SoundExchange is correct that iHeartMedia's DAIP Program — like the AIP Program — is an "industry-relations tool" that iHeartMedia uses to improve its relationship with the music industry by supporting its efforts to build artists' brands and sell music, and that these programs are mutually beneficial for iHeartMedia and the music industry. Poleman WRT ¶¶ 20-21. Record label participation in the DAIP Program — which is obviously voluntary and has increased over time — proves that the music industry has embraced the DAIP Program. *See* IHM FoF ¶¶ 140-143. So does the conduct of the labels after a song is selected for inclusion in the DAIP Program. [REDACTED]

[REDACTED]

[REDACTED]

Record labels are informed that they waive royalties when they participate in the DAIP Program. *See* IHM FoF ¶ 140; AIP Terms (IHM Ex. 3214). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1177. This paragraph argues that promotion on terrestrial radio is due to the “legal anomaly” that there is no performance right on terrestrial radio is unsupported lawyer argument. But SoundExchange’s sole support, Mr. Burruss, did not testify that record labels promote on terrestrial radio because there is no royalty for such play; he merely testified that the absence of such a royalty is an anomaly. *See* Burruss WRT ¶ 8. The record demonstrates that record labels engage in radio promotion not because there’s no royalty, but because it remains — by far — the top way that consumers access music, and has a proven history of promoting music sales and breaking new artists. *See* IHM FoF ¶¶ 113-122.

1178-1179. This paragraph attempts to distinguish simulcast from terrestrial radio by claiming that, because of Song Exchange technology, “iHeartRadio simulcasts *do not* play the same content as iHeart’s terrestrial radio stations.” But Song Exchange is used for, among other things, increasing the share of spins for iHeartMedia’s label partners, and is therefore further evidence of the promotional capabilities of simulcast. *See* Littlejohn WDT ¶ 3 (“A motivating factor for the development of Song Exchange was the desire to promote the songs of a particular record label more heavily using Internet simulcasts.”). The record labels clearly value this promotion: they have bargained for it, and their documents admit as much. *See* IHM FoF Parts II.D & E; [REDACTED]

[REDACTED]

1180. This paragraph consists of additional lawyer argument attempting to distinguish simulcast and terrestrial radio on the basis of their relative geographic limitations.

SoundExchange offers no basis for its suggestion that the absence of a geographic restriction makes simulcast less promotional than terrestrial radio; nor, as described above, does that make economic sense, because simulcast expands the geographic reach of terrestrial radio, and successful promotion depends on repeated exposure to the largest possible audience. *See* IHM Response FoF ¶ 245. SoundExchange also claims that iHeartRadio allows users to “‘immediately listen’” to songs they search for, particularly for popular artists. But as described above, Mr. Kooker’s trial testimony proved that this was not in fact the case. *See* IHM Response FoF ¶¶ 275-276; IHM FoF ¶ 309.

1181. This paragraph consists of additional unsupported lawyer argument attempting to characterize the extensive record of record company promotional documents as selectively chosen and inconclusive. In addition to finding no support in the record, *see* IHM FoF Part II.A-E, SoundExchange’s argument rings particularly hollow given its resistance throughout discovery to produce promotional materials from the labels, and its decision to present only a single witness (Fowler) with direct responsibilities for promotion on webcasting services.

1182-1183. This paragraph claims that expert testimony confirms that record company promotional documents are inconclusive, but the cited testimony provides no such support. Ms. Butler (one of the two experts SoundExchange cites) did not review the entire record, but only a very limited number of survey documents, and did not attempt to determine whether any of these surveys used methodologies that rendered them reliable. *See* IHM FoF ¶ 307. [REDACTED]

[REDACTED]

1184. This paragraph attempts to explain away two record company promotional documents by asserting that “[n]either speaks to the impact that non-interactive services are having on paid subscriptions.” But both documents, as SoundExchange impliedly concedes, demonstrate that statutory services continue to promote what remains the largest source of record industry revenues, physical and download sales. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1185. This paragraph argues that some record company promotional documents “tell the opposite story,” but cites only one document in support. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See, e.g.,* [REDACTED]

[REDACTED]

[REDACTED]

1186. Unable to dispute that promotion is central to the workings of the music industry today, SoundExchange concludes that “[t]his is a rapidly evolving industry and opinions, particularly with regard to a changing issue such as promotion/substitution, are likely to equally rapidly evolve.” But there is no evidence that promotion has become less important or that it is likely to become less important in the future. To the contrary, the record labels have been *increasing* their promotion budgets in recent years. *See* IHM FoF ¶ 103.

RESPONSE TO PART XIV – ALL WEBCASTERS ARE UNPROFITABLE AT CURRENT RATES

1187-1188. SoundExchange is wrong to imply that the *Webcasting III Remand* decision holds that the financial health of the entire webcasting industry is irrelevant to rate proceedings. Nothing in that decision’s rejection of rate-of-return ratemaking — which neither iHeartMedia nor any other Service proposes here — holds that, in establishing an appropriate royalty rate, the Judges must ignore evidence showing that the *entire industry* has failed to see a single profitable webcaster — or even a single profitable year by a single webcaster — in its entire 15-year-plus history. As iHeartMedia demonstrated, the evidence here shows that the

existing high royalty rates are the principal reason for the inability of webcasters to earn a profit. *See* IHM FoF ¶¶ 38-44. Moreover, the evidence here demonstrates the *long-term* unprofitability of the webcasting industry at the current rates, both in the past and over the projected future. *See* IHM FoF ¶¶ 38-41, 45-46. Indeed, SoundExchange’s own proposed findings undermine any suggestion that the webcasting industry has only experience “short-term” unprofitability. *See, e.g.,* SX FoF ¶ 9 (“Five years is an eternity in this rapidly developing market.”); *id.* ¶ 354 (asserting that “‘free’ interactive services are far from ‘experimental’ or ‘not mature’” since Spotify’s service “entered the U.S. market in 2011”). The evidence shows that iHeartMedia remains in the digital radio business in the hope that it will be able through agreements and reduced CRB rates to build a sustainable business that is profitable for all music industry stakeholders. *See* IHM FoF ¶ 17.

1189. The paragraph of Professor Lys’s written rebuttal testimony summarized here ignores the testimony of iHeartMedia and Pandora executives at the hearing regarding the

[REDACTED]

[REDACTED]

[REDACTED]. *See* IHM FoF ¶¶ 15-16, 34-35. SoundExchange also ignores the testimony from Michael Herring that, at the rates SoundExchange proposes, Pandora would have “to take even more ‘drastic measures’ that would harm its growth, consumers, and the recorded music industry.” IHM FoF ¶¶ 35, 55-59. This evidence demonstrates that webcasters as a whole — as the “willing buyers” under the statutory standard — are constrained by real-world financial realities and limitations on what they can continue to pay and that the financial health of the entire webcasting industry would be negatively impacted by continuing high royalty rates.

1190. Professor Lys’s hypothetical involving an airline ignores the evidence in the record demonstrating the actual, real-world constraints on webcasters increasing their prices and advertising revenues in response to increased royalty fees, constraints which include the small number of consumers who are willing to pay for streaming music and the intense competition webcasters face from within the industry and from other free sources of music. *See* IHM FoF ¶¶ 45-46.

1191. Professor Lys’s hypotheses that Pandora could increase advertising or subscription rates if the Judges were to adopt SoundExchange’s proposal to *double* the royalty rate it pays cannot be squared with the actual testimony from Pandora’s CFO Michael Herring regarding Pandora’s inability to do so. *See, e.g.*, Herring WDT ¶ 9 (describing negative consequences of increasing advertising on listening hours and revenue for Pandora and SoundExchange); *see also* Tr. at 3351:5-7, 3367:22-24 (Herring) (explaining that “if we add to[o] many ads in an hour . . . it reduces the amount of listening that occurs,” which can “limit the number of hours [consumers] actually stream and therefore limit the advertisements we have available to sell”).

1192. Professor Lys cites no actual evidence that his theoretical cost cutting — for example, “for servers or for network bandwidth” or any other categories of expenses — would permit specific webcasters or webcasters more generally to achieve profitability, either at the current rates or at the higher rates that SoundExchange proposes.

1193. iHeartMedia refers the Judges to Pandora’s response. *See also* IHM Response FoF ¶ 1189.

1194. This paragraph cites no evidence at all to support its assertions regarding the alleged “tradeoff” webcasters have made to sacrifice profits, and instead appears merely to

preview the forthcoming paragraphs of SoundExchange's Proposed Findings of Fact. To the extent it is interpreted as such, no response is required.

In all events, SoundExchange's assertion that webcasters have prioritized growth or future profits over current or short-term profits is inconsistent with the record in this case. As iHeartMedia demonstrated, the evidence establishes that there is no evidence of *any* profitable webcasters in the history of this industry — which has been in existence for more than 15 years — including among firms that are not pursuing a short-term growth strategy; and that firms like Pandora are, in fact, currently trying to maximize profits. *See* IHM FoF ¶¶ 47-48. Indeed, the evidence shows further that — in light of the fact that webcasters are currently losing money on every royalty-bearing performance — if webcasters are able to grow their services, their losses will only *increase*. *See* IHM FoF ¶ 40.

Moreover, SoundExchange's assertion ignores the hearing testimony and other record evidence from industry analysts — including evidence relied upon by SoundExchange's own experts — that demonstrates that the high royalty rates that webcasters pay, and not any purported decision to forego current profits, is primarily responsible for webcasters' unprofitability. *See* IHM FoF ¶¶ 42-43. Furthermore, SoundExchange's rate proposal — which would actually increase the rates that all participants are paying and would roughly *double* the rate that the approximately 80 percent of the market subject to Pureplay rates is paying — would make it even less likely that any webcasters could ever achieve profitability. *See* Peterson WRT ¶ 77 (“A dramatic increase in current costs — including a near doubling of royalty rates — necessarily will interfere with Pandora's ability to continue to invest in its business, negatively affecting future growth and profitability.”); IHM FoF ¶ 36. Analysts do not believe that even

under the current market conditions that Pandora will *ever* be profitable on an annual basis. *See* Tr. at 6217:15-18 (Pakman); Pakman WDT ¶ 27.

1195-1196. The quotations in these paragraphs are generic statements about firms, untethered to the record evidence about webcasters' actual operations described above. *See also* Peterson WRT ¶ 9 ("A rational, profit-seeking firm will not 'delay' profitability.").

1197-1198. SoundExchange cites no evidence for the factual premise of these paragraphs — that webcasters are focused on growth and future profits at the expense of current profits. As shown above, the record contradicts this premise. Moreover, Professor Rysman's testimony ignores the fact that, as David Pakman testified, it is most notable that there are no counter-examples of any profitable webcasters who have ever made a profit pursuing any strategies, whether the same or different than Pandora's alleged growth strategy. *See* IHM FoF ¶ 48; Tr. at 6221:6-9 (Pakman) ("Q. Have you seen any examples of companies who were pursuing a different business model or strategy than Pandora who are profitable? A. No, I have not.").

1199. This paragraph recounts Professor Rysman's quotation of a four-year old iHeartMedia presentation regarding an alleged [REDACTED]. That stale "evidence" cannot be credited over current testimony from iHeartMedia's Chief Executive Officer and Chairman of the Board of Directors, Robert Pittman, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

1200. Professor Rysman is incorrect that Songza's alleged strategy to focus on future profits has "paid off" due to its acquisition by Google; and SoundExchange's focus on this lone, very small webcaster's sale as evidence of a successful business model of deferring profits does nothing to address the overwhelming evidence of financial struggles in the webcasting industry more generally, including the lack of profitable firms, the high failure rates, and the low levels of both investments and successful outcomes. *See* IHM FoF ¶¶ 33-54. Notably, Professor Rysman does *not* suggest that Songza ever was profitable or that it had prospects to become profitable; nor does he suggest that Google's acquisition means that it can ever operate a profitable or successful standalone webcasting business.

1201-1204. iHeartMedia refers the Judges to Pandora's response. *See also* IHM Response FoF ¶ 1194.

1205-1206. iHeartMedia refers the Judges to NAB's response. *See also* IHM Response FoF ¶ 1194.

1207. Professor Rysman's assertion that it would be "rational" for a webcaster to "focus[] on long-run profitability at the expense of short-run profits" ignores the testimony, detailed above, that webcasters such as iHeartMedia and Pandora are not doing so. *See* IHM Response FoF ¶ 1194.

1208. *See* response to Paragraphs 1197 and 1198.

1209-1211. SoundExchange is wrong to contend that the portion of the *Webcasting III Remand* decision quoted here holds that it is improper for the Judges to consider standalone webcaster profitability in setting rates in this proceeding. The Judges there found that one problem with Live365's expert's analysis of a single small webcaster's cost structure was that "Live365 is not sufficiently representative of all webcasters," because the evidence "revealed an

array of existing webcasting services and business models.” *Webcasting III Remand*, 79 Fed. Reg. at 23108. In criticizing the expert’s failure to consider the “*synergistic* nature of Live365’s various lines of business,” the Judges observed that there was no evidence “of a comparable participant in the industry that is structured in [the same] manner” as Live365. *Id.*

Here, by contrast, the evidence shows conclusively that *no* industry participant has been able to sustain a profitable business, *regardless* of the business model it pursued or is pursuing, primarily due to the high royalty costs each is paying. *See* IHM FoF ¶¶ 38-43. This record includes undisputed evidence that the two largest webcasters — which participated in this proceeding and account for approximately [REDACTED] of SoundExchange’s royalty payments — are not profitable. *See* IHM FoF ¶¶ 10, 38-39. There is no evidence that there are any “synergistic” benefits of these unprofitable webcasting businesses. Indeed, iHeartMedia operates an unprofitable webcasting business and has only “stopped short of exiting the business because it can afford to subsidize its losses through other lines of business while it pursues the goal of lower royalty rates.” IHM FoF ¶ 17 (quoting Pittman testimony). But even then, iHeartMedia has continued to try and develop and operate a statutory service — not because of some theoretical “synergistic” benefits — but because of the company’s hope that ““eventually economics win”” and a ““willing[ness] to invest a certain amount of money to be a player in that game for the day in which the real economics arrive.”” *Id.*

iHeartMedia has shown that the only workable solution for the industry as a whole, including for webcasters specifically, is for the Judges to establish lower statutory rates for webcasting so that there will be positive returns on, and continued investments in, webcasting businesses. *See* IHM FoF ¶¶ 55-58. In fact [REDACTED] IHM FoF ¶ 59, further refuting

any suggestion now by SoundExchange that some hypothetical “synergies” might justify continuing high rates and consistently unprofitable webcasting businesses.

1212. SoundExchange’s reliance on the testimony of David Pakman that companies like Google and Amazon “seem to be willing to operate break-even or unprofitable digital music services because their other companion businesses are wildly profitable” is misplaced and mischaracterizes and ignores the relevant testimony from Mr. Pakman. As Mr. Pakman explained, it would be a sign of an “unhealthy market” if only large, multi-business companies like Amazon and Google were able to survive. *See* IHM FoF ¶ 53. Indeed, the existence of firms that are content running unprofitable webcasting business is “something that would discourage further entry by companies trying to make a profit.” Tr. at 6228:3-10 (Pakman). *See also* IHM Response FoF ¶ 1209.

1213-1215. iHeartMedia refers the Judges to NAB’s response. However, iHeartMedia notes that SoundExchange offers no evidence that Lincoln Financial Media Company is “representative of all webcasters.” *Webcasting III Remand*, 79 Fed. Reg. at 23108.

1216. In sum, the evidence refutes SoundExchange’s assertion that it is “misleading” to consider the evidence that no webcaster has ever been profitable and that none is likely to be profitable in the future at the current rates — much less at the higher rates SoundExchange proposes here.

1217-1240. iHeartMedia refers the Judges to Pandora’s response. iHeartMedia also notes that independent market analysts uniformly conclude — contrary to the assertions of SoundExchange’s paid expert — that Pandora can never be profitable, even at the Pureplay rates it currently pays. *See, e.g.*, Tr. at 6217:15-18 (Pakman) (“And the research reports I read by public market stock analysts, none of them . . . believe that Pandora will ever be profitable on an

annual basis.”); Pakman WDT ¶ 27 n.34 (quoting Generator Research report that states “[o]ur analysis is that no current music subscription service — including marquee brands like Pandora, Spotify and Rhapsody — can ever be profitable, even if they execute perfectly[,] and the reason for this is that it is almost inconceivable that the music industry will agree to significantly reduced royalties.”).

1241. iHeartMedia refers the Judges to NAB’s response. iHeartMedia also notes that SoundExchange’s assertion that simulcasters can afford to pay the higher rates it proposes ignores the views of the record labels themselves, which have observed that there is a need to

████████████████████ IHM FoF ¶ 59; *see also id.* ¶¶ 245-253.

1242. The data Dr. Blackburn relies upon regarding alleged industry entry does not demonstrate that the market is healthy or that the existing royalty rates are reasonable or appropriate. Entry by firms like Google, Amazon, or Apple (with its iTunes Radio service) that are willing to run unprofitable webcasting businesses does not demonstrate industry health. *See* IHM FoF ¶ 53. Furthermore, the webcasting industry has seen relatively low levels of meaningful investment in relation to comparable industries, again primarily due to the high royalty rates that webcasters must pay. *See* IHM FoF ¶¶ 50-51.

1243. Dr. Blackburn’s count of “statutory” webcasters in 2010 and 2013 includes more than 1,100 firms that are not paying the commercial statutory rate. *See* Peterson WRT ¶ 29; *see also* Tr. at 1696:1-1704:17 (Blackburn) (conceding that he made no attempt to distinguish between webcasters paying the commercial and non-commercial rates or paying the \$500 minimum fee); Tr. at 1707:9-20 (Blackburn) (admitting that he does not know how many webcasters paying only the \$500 minimum fee moved to paying higher amounts over time and

that although “there might be a couple, but there’s not a lot”). The record shows that “webcasters generally paying usage rates at or near the commercial statutory webcaster rates . . . are less likely to survive than Dr. Blackburn’s analysis shows.” Peterson WRT ¶¶ 18, 20-23. Also, as Dr. Blackburn himself concedes, the vast majority of SoundExchange’s royalties are paid by only two webcasters — iHeartMedia and Pandora — and witnesses for both testified that they have struggled even at the existing NAB-settlement and Pureplay rates, respectively. *See* IHM FoF ¶¶ 38-39; *see also* Peterson WRT ¶ 30-31 (noting that “looking at webcaster counts alone presents a highly misleading picture of the statutory webcasting industry because the bulk of royalties are paid by a small share of webcasters — and primarily by non-subscription pureplay webcasters that pay royalties at rates substantially below commercial statutory rates”).

1244. Dr. Blackburn’s testimony regarding the allegedly “high” survival rates in statutory webcasting is refuted by the industry research and analysis David Pakman performed. As discussed in iHeartMedia’s Proposed Findings of Fact, using the PitchBook Platform, Mr. Pakman did an “empirical analysis comparing the high failure rates in webcasting to other Internet or eCommerce industries,” which showed that “digital music companies are twice as likely to fail than these other sectors.” IHM FoF ¶ 49.

1245-1246. SoundExchange ignores Dr. Blackburn’s admission, on cross-examination, that the “survival rate” for all webcasters was approximately 40 percent higher than that for commercial CRB webcasters. *See* Tr. at 1709:3-1710:14 (Blackburn). Moreover, he acknowledged that the difference between the two survival rates would only grow over time. *See* Tr. at 1710:15-1712:6 (Blackburn) (testifying that the failure rates in the first year of his analysis, 2012, would be lower as “[t]here was less time in which you could exit”, and “[b]y definition” would be zero in 2013). Dr. Blackburn’s decision to analyze the alleged resiliency of

all webcasters — without separately analyzing webcasters paying the high commercial rate — renders his conclusions unreliable and provides no support for SoundExchange’s proposal to *increase* the statutory rate (and roughly double the Pureplay rate).

RESPONSE TO PART XV – THE MINIMUM FEE

1247-1254. iHeartMedia takes no position on the issues set forth in this Part.

RESPONSE TO PART XVI – NONCOMMERCIAL WEBCASTERS

1255-1265. iHeartMedia takes no position on the issues set forth in this Part.

RESPONSE TO PART XVII – PROPOSED TERMS AND REGULATIONS

1266. This paragraph quotes in part 17 U.S.C. § 114(f)(2)(B) and the *Webcasting II* decision. No response is required.

1267. This paragraph describes in general terms SoundExchange’s proposed terms. No response is required.

1268. This paragraph describes SoundExchange’s proposal to reduce the period for payment to 30 days, but cites no evidence in support of that proposal. No response is required.

1269. This paragraph summarizes Professor Lys’s review of 62 agreements — only one of which (the iHeartMedia-Warner Agreement) involved a noninteractive service. *See* Tr. at 1474:23-1475:10 (Lys). Indeed, Professor Lys did not include in his review *any* of iHeartMedia’s 27 agreements with independent labels. *See* Tr. at 1476:18-1477:2 (Lys). Professor Lys also did not offer any evidence about the steps an interactive service must take to calculate and make payment to a record label, or any evidence comparing those steps — and the time necessary to complete those steps — to the steps a noninteractive service must take to calculate and make payment. *See* Tr. at 1477:13-1478:20 (Lys). The only evidence in the record in this regard came from iHeartMedia executive Jon Pedersen, who testified from personal knowledge that 30 days is an unreasonably short period in which to perform all the work that

must be done. *See* Pedersen WRT ¶¶ 24-30; Tr. at 3683:10-3685:9 (Pedersen) (explaining that the “process overall takes . . . somewhere between . . . 28 and 45 days depending on what happens in any particular month”).

1270. This paragraph quotes from Mr. Bender’s pre-filed testimony. But Mr. Bender offered no facts to support his assertion that reducing the period for payment to 30 days is reasonable in light of the work noninteractive services must perform to calculate the payment due. *See* IHM FoF ¶ 442. Again, the only such evidence came from Mr. Pedersen, which demonstrates that SoundExchange’s proposal is unreasonable. *See* Pedersen WRT ¶¶ 24-30; Tr. at 3683:10-3685:9 (Pedersen).

1271. This paragraph quotes from Professor Lys’s pre-filed testimony. Professor Lys, however, offered no evidence of any statutory licensees that are ““risky counterparties”” or ““credit risks”” that could support his theoretical claim that such risks justify shortening the period for payment.

1272. Admitted that Mr. Pedersen and Mr. Herring testified in support of maintaining the current 45-day payment term.

1273. In noting that iHeartMedia’s agreements with Warner and Big Machine contain [REDACTED], SoundExchange ignores Mr. Pedersen’s testimony that, in light of

iHeartMedia’s experience under those agreements — iHeartMedia missed the [REDACTED]

[REDACTED] Pedersen WRT ¶ 30. In addition, nothing in this paragraph refutes Mr. Pedersen’s testimony that the majority of iHeartMedia’s direct licenses — 27 of which Professor Lys did not review — [REDACTED]. *See id.*

1274-1275. These paragraphs address testimony from Mr. Herring of Pandora. Nothing in these paragraphs addresses or refutes the detailed evidence Mr. Pedersen presented regarding the time necessary for a noninteractive service to determine the payments due for the music played during a month. *See id.* ¶¶ 24-30; Tr. at 3683:10-3685:9 (Pedersen).

1276-1286. These paragraphs address SoundExchange's proposals to revise the qualified auditor definition and to eliminate the acceptable verification procedure. iHeartMedia refers the Judges to the responses of other Services with regard to these paragraphs.

1287. This paragraph introduces SoundExchange's objections to Services' proposals regarding the terms of the statutory license. No response is required.

1288. Although Mr. Bender asserted that late fees are ““crucial”” to SoundExchange's operations, he provided no empirical evidence to support that assertion. In particular, he offered no quantification of the administrative costs SoundExchange incurs when payment is late or any comparison of those costs to the amounts SoundExchange collects at the current 1.5 percent per month late payment rate. *See* Tr. at 7139:17-7140:19 (Bender). Mr. Bender's assertion that, if the late payment fee were lower, SoundExchange would get paid “later and later” also has no empirical support. [REDACTED]

[REDACTED]. In addition, Mr. Bender's claims are contradicted by [REDACTED]

[REDACTED]. *See* IHM FoF

¶ 428. [REDACTED]

[REDACTED]

1289-1293. These paragraphs address a Pandora proposal. No response is required.

1294. Admitted.

1295. SoundExchange's contention that the tax underpayment penalty in 26 U.S.C. § 6621 — which is based on a market interest rate plus 3 or 5 percentage points (depending on the extent of the underpayment) — “does not create a sufficient incentive to meaningfully encourage timely submission of payments and statements of account” is based solely on the *ipse dixit* of Mr. Bender. As shown above in the response to Paragraph 1288, Mr. Bender offered no empirical evidence to support his assertion, which is contradicted by both Warner's willingness to waive the 1.5 percent late payment fee in its direct license with iHeartMedia; 27 independent labels' willingness to enter into direct licenses that contain no late payment fee at all; and the use of prime plus two percent as the annual late payment rate in the Pandora-Merlin Agreement.

1296. SoundExchange cites no record evidence to support its assertion that iHeartMedia's proposal to reduce the late payment fee is not in line with any late payment fee in any marketplace agreement. The record shows that iHeartMedia's agreements with 27 independent labels contain no late payment fee at all. *See* IHM FoF ¶ 428. [REDACTED]

[REDACTED]

[REDACTED]. Furthermore, 45

percent of the agreements Professor Lys reviewed — though all with interactive services — contain a market-based late payment fee or no late payment fee at all. *See* Lys WDT ¶ 39 & Figure 5.

1297. SoundExchange’s statement that Professor Lys found that “63% of [the agreements he reviewed] containing specific interest charges for late payments” included a 1.5 percent per month fee, ignores 13 percent of the agreements that Professor Lys reviews (which contained no late payment fee at all or was unknown). *See* Lys WDT ¶ 39 & Figure 5. Professor Lys offers no basis for ignoring these agreements — or iHeartMedia’s 27 agreements with independent labels, which contain no late payment fee and which Professor Lys was not shown by SoundExchange. *See* Tr. at 1476:18-1477:2 (Lys). Indeed, Professor Lys did not even know that the current late payment fee in the statutory license was 1.5 percent, *see* Tr. at 1479:18-20 (Lys), or whether the agreements he reviewed that contained the 1.5 percent per month late payment fee did so *because of* the statutory license rate, *see* Tr. at 1479:25-1480:10 (Lys). Therefore, in counting up late payment fee provisions he found in a limited set of agreements selected for him by SoundExchange, Professor Lys made no effort to remove the effect of the shadow of the statutory license on those agreements. Professor Lys’s testimony provides no basis for maintaining a late payment rate so out of line with actual direct licenses in the noninteractive market, Warner’s willingness to waive the 1.5 percent fee in its agreement with iHeartMedia, marketplace interest rates, and economic theory. *See generally* IHM FoF ¶¶ 427-428.

1298. This paragraph addresses a Pandora proposal. No response is required.

1299. Admitted.

1300. SoundExchange’s assertion that allowing statutory licensees to correct overpayments — or to receive credit for overpayments identified in audits — “would discourage services from taking . . . seriously” their responsibility to calculate correctly their payment obligation in the first instance is based solely on the *ipse dixit* of Mr. Bender. Mr. Bender

offered no empirical evidence to support his assertion. Moreover, Mr. Bender testified that SoundExchange has a process for correcting *its own* overpayments to copyright owners when it discovers them in a subsequent month. *See* Tr. at 7144:4-9 (Bender). Mr. Bender does not suggest that this ability discourages SoundExchange from taking seriously its own responsibilities to copyright holders, undermining his assertion that the same would be true of Services if they could avail themselves of the same process.

1301-1305. These paragraphs recount Mr. Bender's testimony that allowing Services to correct overpayments would impose significant operational burdens on SoundExchange. But Mr. Bender admitted on cross-examination that SoundExchange is willing to shoulder those same operational burdens when *it* makes an overpayment. *See* Tr. at 7144:4-9 (Bender). Neither Mr. Bender nor SoundExchange offered any reason why copyright holders should be permitted to keep unearned royalties that they mistakenly received. *See* Tr. at 7144:10-12 (Bender) ("Q. But if a service makes a mistake, the artists just keep the money? A. Yes."). And neither offered any reason why audits should operate only as a one-way ratchet — with Services liable for any underpayments uncovered, but not entitled to credit for any overpayments uncovered.

1306. iHeartMedia withdraws its proposal that a Service receive interest on overpayments that are returned.

1307-1327. These paragraphs address various proposals regarding the terms of the statutory license. iHeartMedia refers the Judges to the responses of other Services with regard to these paragraphs.

1328. iHeartMedia agrees that the statutory license rate should apply to both simulcast and custom webcast transmissions. *See* IHM CoL Part VII.

1329-1330. These paragraphs contain legal argument. iHeartMedia refers the Judges to Part VII of its Proposed Conclusions of Law, which explain why — if the Judges were to establish a lower rate for simulcast performances — songs on a simulcast stream that mirror the terrestrial broadcast should remain eligible for the lower simulcast rate, even if additional songs are played on that stream, whether as replacements for terrestrially broadcast songs or advertisements.

1331. This paragraph addresses an NAB proposal. No response is required.

1332. This paragraph contains legal argument. iHeartMedia refers the Judges to Part VI of its Proposed Conclusions of Law, which set forth the legal basis for including in the statutory licenses terms that are found in the overwhelming majority of noninteractive agreements in the record and that modify the background statutory provisions. *See also* IHM FoF ¶¶ 425-426 (identifying the agreements that contain the provisions that iHeartMedia proposes to include in the statutory licenses).

1333. This paragraph addresses NAB and NRBNMLC proposals. No response is required.

RESPONSE TO PART XVIII – DESIGNATION OF A COLLECTIVE

1334-1367. iHeartMedia does not oppose designation of SoundExchange as the collective.

RESPONSE TO PART XIX – SECTION 112 ROYALTY FOR EPHEMERAL COPIES

1368-1378. iHeartMedia supports the current bundling of the § 112 and § 114 royalties.

CONCLUSION

As set forth above, and in iHeartMedia's Proposed Findings of Fact and Conclusions of Law and its Response to Proposed Conclusions of Law, the Judges should adopt iHeartMedia's

Proposed Findings of Fact, its proposed rate of \$0.0005 per performance, and its proposed modifications to the terms of the statutory license discussed above.

Dated: July 15, 2015

Respectfully submitted,

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Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of

DETERMINATION OF ROYALTY RATES
FOR DIGITAL PERFORMANCE IN SOUND
RECORDINGS AND EPHEMERAL
RECORDINGS (WEB IV)

Docket No. 14-CRB-0001-WR
(2016–2020)

iHEARTMEDIA, INC.'S
RESPONSE TO SOUNDEXCHANGE'S
PROPOSED CONCLUSIONS OF LAW

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I. IN EVALUATING BENCHMARK AGREEMENTS, THE JUDGES MUST LOOK TO THE PARTIES' EXPECTATIONS AT THE TIME OF THE AGREEMENT, NOT TO POST-AGREEMENT PERFORMANCE

SoundExchange purposely chose to value the proposed benchmark agreements in this proceeding by looking solely at post-agreement performance, taking the position that it would be inappropriate to consider the parties' expectations at the time they signed direct license agreements. *See* Rubinfeld WDT ¶ 205 n.123 ("I have relied on monthly performance data rather than attempting to evaluate parties' expectations at the time they entered into various agreements."); Rubinfeld WRT ¶¶ 6, 26; SoundExchange's Opp'n to iHeartMedia's Mot. To Compel SoundExchange To Produce Docs. in Resp. to Disc. Reqs. at 6, 15 (Nov. 21, 2014) (asserting that SoundExchange's written direct case analyzed the iHeartMedia-Warner direct license "based solely on the final terms and performance-to-date"; "iHeart[Media] . . . placed [the iHeartMedia-Warner direct license] agreement at the center of its case and delved into every facet of it — *including its internal valuation*. SoundExchange did nothing of the sort."). As discussed in iHeartMedia's Proposed Conclusions of Law, that is an error under the relevant legal standard. *See* IHM CoL Part I.

In its Proposed Conclusions of Law, SoundExchange for the first time acknowledges that "pre-agreement projections are both relevant and admissible to determine 'the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.'" SX CoL ¶ 56 (quoting 17 U.S.C. § 114(f)(2)(B)). SoundExchange argues, however, that post-agreement performance should also be considered with expectations on a coequal basis, and that when there are evidentiary difficulties — for example, "if years have gone by before the evidence is offered" — post-agreement performance may be preferable to expectations. *Id.* ¶ 58 (quoting *Sinclair Ref. Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689, 698 (1933)).

SoundExchange's principal authorities for looking to post-contract performance, in addition to or

instead of at-the-time-of-contracting expectations, are the Federal Circuit's decisions determining reasonable royalties in a patent case. *See id.* ¶ 57 (citing *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301 (Fed. Cir. 2009)).

SoundExchange misstates the precedents. The Federal Circuit's recent decision in *Aqua Shield v. Inter Pool Cover Team*, 774 F.3d 766 (Fed. Cir. 2014), applying both the *Lucent Techs.* and *Sinclair* decisions on which SoundExchange relies, held that "expectations govern, not actual results." *Id.* at 772 (citing *Interactive Pictures Corp. v. Infinite Pictures, Inc.*, 274 F.3d 1371, 1385 (Fed. Cir. 2001)). As the Federal Circuit explained, actual results following the time of a license negotiation "may be relevant, but only in an indirect and limited way," because "the core economic question" is what would have been "*anticipated*" at the time of the negotiation. *Id.* at 770. The court in *Aqua Shield* therefore found it was an error to "replace[] the hypothetical inquiry into what the parties would have anticipated, looking forward when negotiating, with a backward-looking inquiry into what turned out to have happened." *Id.* at 772 (citing *Interactive Pictures Corp.*, 274 F.3d at 1385). The Federal Circuit applies the same standard in copyright cases. *See, e.g., Gaylord v. United States*, 777 F.3d 1363, 1370 (Fed. Cir. 2015) (citing *Aqua Shield*, 774 F.3d at 771 & n.1, and noting that the court "appl[ies] the same concept in the patent context").

As these cases hold, post-agreement performance is *not* coequal with expectations even in the situation where the bargaining was purely hypothetical, such as between a patentee and a licensee who, at the time of the hypothetical bargain, did not talk to each other, did not negotiate or reach an agreement, and may not have been aware the licensee was infringing the patent. In the current proceeding, where the record contains actual agreements and records of negotiations between willing buyers and willing sellers in the very market and for the very product at issue,

there is much less “approximation and uncertainty” regarding the expected benefits of the license and therefore less reason to look to actual results to fill in what the parties would have been willing to agree to at the time of the bargain. *Aqua Shield*, 774 F.3d at 771 (quoting *Lucent Techs.*, 580 F.3d at 1325). Here, the parties have discernable expectations — expressed in the agreement and in their contemporaneous, internal business projections — that fill in any gaps, such as the quantities of expected performances.

SoundExchange is wrong to use after-the-fact actual performances in place of the number of expected performances under the direct license agreements. The courts have rejected a similar use of an infringer’s actual profits as a cap on calculating patent damages. *See Aqua Shield*, 774 F.3d at 770; *Waterton Polymer Prods. USA, LLC v. Edizione, LLC*, No. 2:12-CV-17, 2015 U.S. Dist. LEXIS 32830 at *7 (D. Utah Mar. 16, 2015) (“Plaintiffs’ attempt to cap the reasonable royalty at their profits is erroneous”). Profits are relevant: a willing-buyer-willing-seller negotiation would not set a price that was anticipated to be unprofitable for the licensee. But after-the-fact actual profits are not a proper cap because there may be other explanations for lower-than-expected profits, including post-agreement conduct of the parties. *Aqua Shield*, 774 F.3d at 771 (citing, among other things, the licensee’s “needlessly high costs, wasteful practices, or poor management”). Instead, as the Federal Circuit explained:

[T]he core economic question is what the infringer, in a hypothetical pre-infringement negotiation under hypothetical conditions, would have *anticipated* the profit-making potential of use of the patented technology to be, compared to using non-infringing alternatives. If a potential user of the patented technology would expect to earn X profits in the future without using the patented technology, and X + Y profits by using the patented technology, it would seem, as a prima facie matter, economically irrational to pay more than Y as a royalty — paying more would produce a loss compared to forgoing use of the patented technology.

Id. at 770-71.

Similarly, actual performances of sound recordings under a direct license may be lower than were expected at the time the parties signed the contract for many reasons that do not reflect the terms on which the parties were willing to transact, including here reasons attributable to the conduct of the record company. For example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. In a contract that [REDACTED]

[REDACTED], and where the parties had reasonably congruent

expectations of [REDACTED], it would be economically irrational when applying a willing-buyer-willing-seller standard to use *ex post* lower-than-expected actual use rather than the parties' *ex ante* expected use to determine the terms to which the willing buyer and willing seller had agreed.

II. THE JUDGES MAY NOT CONSIDER NEW EVIDENCE SUBMITTED FOR THE FIRST TIME AFTER THE CLOSE OF THE HEARING

On the last day of the hearing, Chief Judge Barnett formally closed the record pursuant to 37 C.F.R. § 351.12. *See* Tr. at 7658:19-21. Despite this, SoundExchange has proposed numerous "Findings of Fact" that rely on brand new analyses with no basis in the "evidentiary facts developed on the record." 37 C.F.R. § 351.14(c). SoundExchange is attempting through these lawyer-generated analyses to fabricate a new case now to make up for the deficiencies of the case it presented at trial. But none of this "evidence" was submitted with a sponsoring witness (*id.* § 351.10(a)), presented as an exhibit at the hearing (*id.* § 351.10(b)), or accompanied

by the disclosures for studies and analyses (*id.* § 351.10(e)). Thus, the parties and the Judges have been deprived not only of the ability to challenge these analyses during discovery or at the hearing, but also do not have access to the back-up materials necessary to fully evaluate and respond to these new analyses even now.

For example, in paragraph 784, SoundExchange's lawyers offer a recalculation of Professor Fischel and Lichtman's incremental analysis based on a number in the so-called [REDACTED] (SX Ex. 367). But no SoundExchange fact or expert witness offered testimony about this recalculation. Nor did SoundExchange question Professor Fischel or Lichtman about this recalculation at the hearing. Notably, the only testimony that SoundExchange cites in support of its proposed finding in paragraph 784 is two lines of testimony in which Professor Fischel [REDACTED]

[REDACTED]¹ Further lawyer-generated recalculations appear in paragraph 790 — in which SoundExchange does not cite a single document or hearing testimony — and in paragraph 853. *See* IHM Response FoF ¶¶ 790, 853.

SoundExchange goes even further in paragraphs 793-794 and 856-858, each of which contains brand new tables that SoundExchange labels "Replications" of exhibits to Professors Fischel and Lichtman's pre-filed testimony. In reality, these are lawyer-generated exhibits. No

¹ Nor does the SoundExchange exhibit itself carry the weight of this new analysis. The only Warner witness to testify in this proceeding — Mr. Wilcox — [REDACTED]
[REDACTED]. Furthermore, before the hearing, he identified a *different* document as the one reflecting Warner's contemporaneous expectations about the iHeartMedia-Warner Agreement and attached it to his written testimony. *See* IHM FoF ¶¶ 191-193.

SoundExchange witness offered or testified about these tables — not in SoundExchange’s written rebuttal testimony and not at the hearing. Nor did SoundExchange use these tables in an effort to cross-examine Professors Fischel or Lichtman. Although all of the new tables have a “Source” line at the bottom, the cited exhibits do not contain the tables themselves. Instead, those exhibits contain figures that SoundExchange’s lawyers selected for inclusion in these tables and from which SoundExchange’s lawyers seek to draw expert conclusions that those same lawyers did not elicit from any expert on the record. SoundExchange took the same approach in responding to Professor Kendall’s testimony, again creating brand new tables that purport to correct Professor Kendall’s analysis and offering its lawyers’ “expert” opinion testimony that no actual witness (expert or otherwise) offered at the hearing. *See* IHM Response FoF ¶¶ 1151-1152.

SoundExchange’s attempt to propose findings of fact based on new, lawyer-generated analyses not only runs afoul of the Judges’ rules, but also violates settled precedent that requires post-trial conclusions and argument to be based solely on evidence in the record. *See, e.g., United States v. Waldemer*, 50 F.3d 1379, 1383 (7th Cir. 1995) (improper to “infuse . . . closing arguments with facts that the court has not admitted into evidence”); *Whittenburg v. Werner Enters. Inc.*, 561 F.3d 1122, 1128-29 (10th Cir. 2009) (“[T]he cardinal rule of closing argument [is] that counsel must confine comments to evidence in the record and to reasonable inferences from that evidence.”). The Judges should, at a minimum, disregard the proposed findings in the paragraphs cited above and may choose to strike those paragraphs entirely. *See* 37 C.F.R. § 351.14(c) (“Failure to comply with this paragraph (c) may result in the offending paragraph being stricken.”)

III. UNDER THE STATUTORY STANDARD, THE WILLING SELLER IN THE HYPOTHETICAL NEGOTIATION COMPETES WITH OTHER SELLERS

Regardless of how the Judges resolve the question whether § 114(f)(2)(B) requires the Judges to *assume* that the willing buyer and willing seller exist in an effectively competitive hypothetical market,² the record here confirms that record labels — the willing sellers in the hypothetical market — do, *in fact*, compete with other record labels for additional spins on statutory services to obtain both incremental revenue and increased promotion. As iHeartMedia demonstrated in its Proposed Conclusions of Law, in setting a rate pursuant to § 114(f)(2)(B), the Judges must take into account that competition and the benefits that accrue to that individual record label, even when they come at the expense of other record labels. *See* IHM CoL Part III.

The iHeartMedia-Warner Agreement, iHeartMedia's 27 agreements with independent labels, and the Pandora-Merlin Agreement (into which some 15,000 Merlin members voluntarily opted) all involve a record label or labels voluntarily accepting a lower per-play royalty in exchange for additional performances on noninteractive services. *See* IHM FoF Part II.D. Put differently, the record labels that signed these deals are competing on price in order to increase their market share on noninteractive services at the expense of their rivals.

As SoundExchange's own expert witness, Dr. Blackburn, conceded on cross-examination, firms engage in this sort of competition "all the time." Tr. at 5928:2-12 (Blackburn). Moreover, steering to lower-cost sources of supply is "both pro-competitive and

² Compare SX CoL ¶¶ 12-38 (arguing that the hypothetical marketplace is one in which neither the buyer nor seller is coerced and both have reasonable knowledge) with Pandora CoL ¶¶ 28-47 (arguing that the hypothetical marketplace is an effectively competitive one, in which sellers compete with each other); NAB CoL ¶¶ 685-709 (same).

ubiquitous.”³ Statutory services lend themselves to this type of steering-based competition because they offer customers a curated listening experience, whether through a computer algorithm or knowledgeable music programmers. *See* IHM CoL ¶ 21.

SoundExchange is therefore wrong to contend that there is such a thing as a record label’s “*natural* market share[]” that would preclude competition among the willing seller record labels in the hypothetical market. SX FoF ¶ 776 (emphasis added). Indeed, record labels would not spend [REDACTED] annually and employ hundreds of people in order to convince terrestrial broadcasters and webcasters to play their artists’ songs — rather than other songs — if the popularity of each label’s repertoire were a preordained or “natural” phenomenon. *See generally* IHM FoF Part II.A-C.

IV. THE JUDGES MAY CONSIDER DIRECT LICENSES THAT, [REDACTED]

In its Proposed Conclusions of Law, SoundExchange repeats its pre-hearing effort to preclude the Judges from considering the Pandora-Merlin Agreement on the ground that the rates in that agreement, [REDACTED]. *See* SX CoL Part III; SoundExchange’s Objs. to Test. & Exs. at 2-4 (Apr. 20, 2015). SoundExchange was wrong then and is wrong now. Nothing in the statute requires the Judges to exclude from evidence and refuse to consider direct licenses that reflect a voluntary agreement [REDACTED].

The Pureplay Settlement Agreement arose as a result of Congress’s grant to SoundExchange of a time-limited right to enter settlement agreements with webcasters. *See* 17 U.S.C. § 114(f)(5)(A), (F) (settlement authority expires 30 days after enactment of the Webcaster Settlement Act of 2009). Congress deemed such settlement agreements with SoundExchange to

³ *United States v. American Express Co.*, No. 10-cv-4496, 2015 U.S. Dist. LEXIS 20114 at *8 (E.D.N.Y. Feb. 19, 2015); *see* IHM CoL ¶ 22.

be “a compromise motivated by the unique business, economic and political circumstances of webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller.” *Id.* § 114(f)(5)(C). That is why Congress prohibited those settlement agreements, or the “provisions of any agreement[s],” from being admitted as evidence or taken into account at a hearing to set the statutory rate. *Id.*

No participant is seeking to introduce the Pureplay Settlement Agreement — or any of its provisions — as evidence in this proceeding, or asking the Judges to take that settlement into account. In particular, as iHeartMedia has shown, the most informative portion of the Pandora-Merlin Agreement is *not* [REDACTED]. Instead, it is the portion that reflects [REDACTED]

[REDACTED]
[REDACTED]. See IHM FoF ¶¶ 229, 232-233.

[REDACTED]. SoundExchange offers no basis for excluding that evidence.

Moreover, voluntary agreements entered into directly with license holders — not with SoundExchange — long after the statutory settlement period had expired are not “agreements entered into pursuant to [§ 114(f)(5)](A),” which are the only agreements that may be excluded from evidence under § 114(f)(5)(C). Unlike settlements that SoundExchange entered into under § 114(f)(5), which Congress recognized were “a compromise motivated by the unique business, economic and political circumstances” of that time, the Pandora-Merlin Agreement was “negotiated in the marketplace between a willing buyer and a willing seller.” 17 U.S.C. § 114(f)(5)(C). That agreement with a noninteractive streaming service — just like the

iHeartMedia-Warner Agreement and iHeartMedia's agreements with 27 independent labels — is precisely the kind of agreement that the Judges have recognized is most persuasive in determining the rate a willing buyer would pay and a willing seller would accept.⁴ Nothing in § 114(f)(5) precludes the Judges from considering and relying on these marketplace agreements as relevant benchmarks.

Nor is there any merit to SoundExchange's assertion that § 114(f)(5) hampered its ability on cross-examination to introduce evidence showing that the Pandora-Merlin Agreement [REDACTED]. See SX CoL ¶¶ 49-54. Indeed, SoundExchange does not identify *any* point during the hearing in which it sought to ask a question or to introduce a document, but was prevented from doing so on the basis of § 114(f)(5). Instead, SoundExchange's Proposed Conclusions of Law are written as if the hearing had not yet occurred. For example, SoundExchange asserts that "Pandora *could use* [the statute] to preclude cross-examination." SX CoL ¶ 54 (emphasis added). But neither Pandora nor any Service did so during the hearing. SoundExchange's prejudice argument is entirely without merit.

V. THE JUDGES MAY CONSIDER THE SDARS RATE, WHICH FURTHER CORROBORATES IHEARTMEDIA'S RATE PROPOSAL

As one of three additional sources of economic evidence that supports iHeartMedia's rate proposal, Professors Fischel and Lichtman demonstrated that the rate of 11 percent of gross revenues adopted in the *SDARS II* proceeding translates into a per-performance rate for noninteractive custom webcasters of between [REDACTED] and [REDACTED] and, therefore, corroborates

⁴ See Order Denying, Without Prejudice, Motions for Issuance of Subpoenas Filed by Pandora Media, Inc. and the National Association of Broadcasters at 3 (Apr. 3, 2014) (noting the "important evidentiary value of actual marketplace agreements as potential benchmarks in determining the statutory rates").

iHeartMedia's rate proposal. *See* IHM FoF ¶¶ 258-260.⁵ SoundExchange argues that, because a different legal standard applies to the SDARS rate, the Judges must ignore that evidence entirely. *See* SX CoL ¶¶ 69-73.

Although SoundExchange is correct that the legal standards differ under 17 U.S.C. § 801(b) (SDARS) and 17 U.S.C. § 114(f)(2)(B) (Webcasting), Professors Fischel and Lichtman recognized that fact. Indeed, they began their discussion of the SDARS rate by noting just that: "Obviously, the satellite statutory rate is set under a different regulatory standard." Fischel/Lichtman WDT ¶ 105. But, as they went on to explain, from "an economic standpoint," there is no reason why "rates that satisfy the standard applicable to satellite radio would be meaningfully different from rates that satisfy the 'willing buyer / willing seller' standard." *Id.* In its Proposed Conclusions of Law, SoundExchange likewise identifies no economic reason that would justify its proposal to set rates for webcasting that are [REDACTED] than the per-performance rate of [REDACTED] to [REDACTED] implied by the *SDARS II* rate.⁶ The simple fact that different statutory standards are involved does not support SoundExchange's contention that the Judges must ignore the *SDARS II* rate, which further corroborates iHeartMedia's rate proposal.

⁵ The other two source of economic evidence were: (1) a "thought experiment" showing that, even if *all* listening to record music occurred *solely* through statutory services, a per-performance rate of \$0.0014 would maintain copyright holder royalties at their current levels; and (2) an economic value analysis showing that a hypothetical simulcaster could pay a maximum per performance rate of \$0.0005. *See* IHM FoF ¶¶ 236-257. SoundExchange does not address either of these in its Proposed Findings of Fact or Proposed Conclusions of Law.

⁶ Even in its Proposed Findings of Fact — where SoundExchange addresses Professor Katz's testimony about the *SDARS II* rate, *but not* Professors Fischel and Lichtman's testimony about that rate — SoundExchange identifies no economic facts that would justify the massive rate differential it proposes. *See* SX FoF ¶¶ 886-896.

VI. THE JUDGES HAVE STATUTORY AUTHORITY TO ADOPT TERMS FOR TRANSMISSION THAT DEPART FROM THE STATUTORY BACKGROUND RULES WHERE, AS HERE, THE RECORD SHOWS THAT A WILLING BUYER AND WILLING SELLER WOULD AGREE TO THOSE TERMS

SoundExchange asserts — without citation to *any* authority — that the Judges have no authority to adopt terms for the statutory license that deviate from the background terms of the statutory license. *See* SX CoL ¶ 75. SoundExchange is wrong. The statute expressly directs the Judges to establish not only rates, but also “terms for transmissions” by noninteractive services.⁷ As with rates, those terms are to be ones that “most clearly represent the . . . terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.”⁸

The agreements that iHeartMedia has entered into with Warner and with 20 independent labels demonstrate that a willing buyer and a willing seller in a hypothetical market lacking a statutory license would agree to permit a webcaster: (1) [REDACTED]; and (2) [REDACTED]. *See* IHM FoF ¶¶ 425-426; IHM CoL ¶¶ 31-35. The Judges, therefore, have the authority — and, indeed, the obligation under § 114(f)(2)(B) — to include these terms in the statutory license, because they are terms to which a willing buyer and a willing seller in a hypothetical market that lacked a statutory license would agree. Moreover, because these terms *reduce* the willing

⁷ 17 U.S.C. § 114(f)(2)(B) (further stating that the “Judges shall establish . . . [such] terms”); *see also id.* § 114(f)(5)(E)(iii) (defining a “webcaster” as an “entity that has obtained a compulsory license under section 112 or 114 *and the implementing regulations therefor*”) (emphasis added).

⁸ *Id.* § 114(f)(2)(B).

buyer's costs,⁹ if these terms were excluded from the statutory license, the rate evidenced by iHeartMedia's benchmark agreements would have to be *reduced*.

Dated: July 15, 2015

Respectfully submitted,

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⁹ Without these terms, iHeartMedia would have to [REDACTED]

[REDACTED]. Each of these options would increase iHeartMedia's costs or reduce its revenues. Similarly, the labels' agreement that iHeartMedia [REDACTED] also reduces its costs. See IHM CoL ¶¶ 33-34.

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of)
)
)

DETERMINATION OF ROYALTY RATES) Docket No. 14-CRB-0001-WR
FOR DIGITAL PERFORMANCE IN SOUND) (2016-2020)
RECORDINGS AND EPHEMERAL)
RECORDINGS (WEB IV))
_____)

DECLARATION AND CERTIFICATION OF JOHN THORNE
ON BEHALF OF iHEARTMEDIA, INC.

1. I am one of the counsel for iHeartMedia, Inc. (“iHeartMedia”) in this proceeding, and I submit this Declaration in support of the restricted version of Proposed Findings of Fact and Conclusions of Law of iHeartMedia, Inc.

2. On October 10, 2014, the CRB adopted a Protective Order that limits the disclosure of materials and information marked “RESTRICTED” to outside counsel of record in this proceeding and certain other parties described in subsection IV.B of the Protective Order. *See* Protective Order (Oct. 10, 2014). The Protective Order defines “confidential” information that may be labeled as “RESTRICTED” as “information that is commercial or financial information that the Producing Party has reasonably determined in good faith would, if disclosed, either competitively disadvantage the Producing Party, provide a competitive advantage to another party or entity, or interfere with the ability of the Producing Party to obtain like information in the future.” *Id.* The Protective Order further requires that any party producing such confidential information must “deliver with all Restricted materials an affidavit or declaration . . . listing a description of all materials marked with the ‘Restricted’ stamp and the basis for the designation.” *Id.*

3. I submit this declaration describing the materials iHeartMedia has designated “RESTRICTED” and the basis for those designations, in compliance with Sections IV.A of the Protective Order. I have determined to the best of my knowledge, information and belief that the materials described below, which are being produced to outside counsel of record in this proceeding, contain confidential information.

4. The confidential information comprises or relates to information designated RESTRICTED by other participants in this proceeding. iHeartMedia has designated such information as RESTRICTED to maintain its confidentiality in accordance with the Protective Order’s command to “guard and maintain the confidentiality of all Restricted materials.” Protective Order at 2.

5. The confidential information comprises or relates to (1) contracts, contractual terms, and contract strategy that are proprietary, not available to the public, competitively sensitive, and often subject to express confidentiality provisions with third parties; (2) financial projections, financial data, and business strategy that are proprietary, not available to the public, and commercially sensitive; and (3) material subject to third-party licenses or other limitations that restrict public disclosure.

6. If the confidential information were to become public, it would place iHeartMedia at a commercial and competitive disadvantage; unfairly advantage other parties to the detriment of iHeartMedia; and jeopardize iHeartMedia’s business interests. Information related to iHeartMedia’s confidential contracts or iHeartMedia’s relationships with content providers could be used by iHeartMedia’s competitors, or by other content providers, to formulate rival bids, bid up iHeartMedia payments, or otherwise unfairly jeopardize iHeartMedia’s commercial and competitive interests.

7. With respect to the financial information, I understand that iHeartMedia has not disclosed to the public or the investment community the financial information that it seeks to restrict here, including its internal financial projections and specific royalty payment information. Consequently, neither iHeartMedia's competitors nor the investing public has been privy to that information, which iHeartMedia has treated as highly confidential and sensitive, and has guarded closely. In addition, when iHeartMedia does disclose information about its finances to the market as required by law, iHeartMedia provides accompanying analysis and commentary that contextualizes disclosures by its officers. The information that iHeartMedia seeks to restrict by designating it confidential is not intended for public release or prepared with that audience in mind, and therefore was not accompanied by the type of detailed explanation and context that usually accompanies such disclosures by a company officer. Moreover, the materials include information that has not been approved by iHeartMedia's Board of Directors, as such sensitive disclosures usually are, and is not accompanied by the disclaimers that usually accompany such disclosures. iHeartMedia could experience negative market repercussions and competitive disadvantage were this confidential financial information released publicly without proper context or explanation.

8. The contractual, commercial and financial information described above must be treated as restricted confidential information in order to prevent business and competitive harm that would result from the disclosure of such information.

Pursuant to 28 U.S.C. § 1746 and 37 C.F.R. § 350.4(e)(1), I hereby declare under the penalty of perjury that the foregoing is true and correct.

July 15, 2015

Respectfully submitted,

/s/ John Thorne

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CERTIFICATE OF SERVICE

I, John Thorne, hereby certify that a copy of the foregoing PUBLIC version of the Response to Proposed Findings of Fact and Conclusions of Law of iHeartMedia, Inc. has been served on this 15th day of July 2015 on the following persons:

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Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of

DETERMINATION OF ROYALTY RATES
FOR DIGITAL PERFORMANCE IN SOUND
RECORDINGS AND EPHEMERAL
RECORDINGS (WEB IV)

Docket No. 14-CRB-0001-WR
(2016-2020)

**REDACTION LOG FOR iHEARTMEDIA, INC.'S
RESPONSE TO SOUNDEXCHANGE'S PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

iHeartMedia hereby submits the following list of redactions from the Response to SoundExchange's Proposed Findings of Fact and Conclusions of Law, filed July 15, 2015, and the undersigned certifies, in compliance with 37 C.F.R. § 350.4(e)(1), and based on the Declaration of John Thorne submitted herewith, that the listed redacted materials are properly previously designated confidential and "RESTRICTED."

Document	Response to Paragraph(s)	General Description
Response to SoundExchange's Proposed Findings of Fact	P. i, ¶ 3	Contains information previously designated restricted by iHeartMedia.
	P. i-ii, ¶ 3	Contains information previously designated restricted by iHeartMedia.
	P. iii	Contains information previously designated restricted by iHeartMedia and other participants.
	¶¶ 33-34	Contains written testimony designated restricted by SoundExchange. Contains information designated restricted by iHeartMedia.

Document	Response to Paragraph(s)	General Description
	¶ 35	Contains written testimony designated restricted by SoundExchange. Contains hearing testimony previously designated restricted.
	¶ 149	Contains information designated restricted by SoundExchange.
	¶¶ 156-156	Contains hearing testimony previously designated restricted. Contains information previously designated restricted by iHeartMedia and other parties.
	¶ 160	Contains hearing testimony previously designated restricted. Contains information previously designated restricted by SoundExchange. Contains information previously designated restricted by iHeartMedia.
	¶ 161	Contains information previously designated restricted by SoundExchange. Contains hearing testimony previously designated restricted.
	¶ 162	Contains information previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 164	Contains information designated restricted by iHeartMedia.
	¶¶ 204-216	Contains information previously designated restricted by other parties.
	¶ 232	Contains information previously designated restricted by Pandora.
	¶ 235	Contains information previously designated restricted by SoundExchange.
	¶ 236	Contains information designated restricted by iHeartMedia.

Document	Response to Paragraph(s)	General Description
	¶¶ 237-243	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 244	Contains hearing testimony previously designated restricted.
	¶ 250	Contains information previously designated restricted by iHeartMedia.
	¶ 253	Contains information designated restricted by iHeartMedia.
	¶ 254	Contains information previously designated restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.
	¶ 255	Contains information previously designated restricted by iHeartMedia and other parties.
	¶ 269	Contains information previously designated restricted by iHeartMedia.
	¶ 274	Contains hearing testimony previously designated restricted. Contains information previously designated restricted by other participants.
	¶¶ 286-287	Contains information previously designated restricted by iHeartMedia.
	¶¶ 288-289	Contains information previously designated restricted by iHeartMedia.
	¶ 290	Contains information previously designated restricted by other participants.
	¶ 291	Contains information previously designated restricted by other participants.

Document	Response to Paragraph(s)	General Description
	¶ 295	Contains information previously designated restricted by other iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 296	Contains information previously designated restricted by other participants.
	¶¶ 297-301	Contains information previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 320	Contains information designated restricted by iHeartMedia.
	¶¶ 321-322	Contains information previously designated restricted by iHeartMedia.
	¶ 323	Contains information previously designated restricted by iHeartMedia.
	¶ 324	Contains information previously designated restricted by other participants.
	¶ 326	Contains information previously designated restricted by other parties.
	¶ 327	Contains information previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 328	Contains information previously designated restricted by iHeartMedia.
	¶¶ 329-330	Contains information previously designated restricted by other parties.
	¶ 331	Contains information previously designated restricted by other parties. Contains hearing testimony previously designated restricted.

Document	Response to Paragraph(s)	General Description
	¶¶ 341-345	Contains information previously designated restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.
	¶¶ 358-360	Contains written testimony previously designated restricted by other participants.
	¶ 370	Contains hearing testimony previously designated restricted.
	¶ 371	Contains information previously designated as restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.
	¶ 378	Contains hearing testimony previously designated restricted.
	¶¶ 383-386	Contains hearing testimony previously designated restricted.
	¶ 397	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 398	Contains information designated restricted by iHeartMedia.
	¶ 401	Contains information designated restricted by iHeartMedia.
	¶ 405	Contains hearing testimony previously designated restricted.
	¶¶ 408-409	Contains information previously designated restricted by other participants.
	¶ 429	Contains hearing testimony previously designated restricted.
	¶ 431	Contains information previously designated restricted by other participants.
	¶ 432	Contains written testimony previously designated restricted by iHeartMedia.

Document	Response to Paragraph(s)	General Description
	¶ 754	Contains information previously designated restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.
	¶¶ 756-759 & n.14	Contains information previously designated restricted by iHeartMedia and other participants.
	¶ 761	Contains information previously designated restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.
	¶ 763	Contains hearing testimony previously designated restricted. Contains information previously designated restricted by iHeartMedia.
	¶¶ 764-765 & n.16	Contains hearing testimony previously designated restricted.
	¶ 770	Contains information previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶¶ 774-775	Contains hearing testimony previously designated restricted.
	¶ 777	Contains information designated restricted by iHeartMedia.
	¶ 778	Contains information previously designated restricted iHeartMedia.
	¶ 779	Contains information previously designated restricted iHeartMedia. Contains hearing testimony previously designated restricted.

Document	Response to Paragraph(s)	General Description
	¶ 784	Contains information previously designated restricted iHeartMedia. Contains hearing testimony previously designated restricted.
	¶¶ 785-787	Contains information previously designated restricted by iHeartMedia and other participants.
	¶ 788	Contains hearing testimony previously designated restricted.
	¶ 789	Contains information previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 790	Contains information previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 791 & n.19	Contains information previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 792	Contains information previously designated restricted by iHeartMedia.
	¶ 794	Contains information previously designated restricted by . Contains hearing testimony previously designated restricted.
	¶ 795	Contains information previously designated restricted by iHeartMedia.
	¶ 797	Contains information previously designated restricted by . Contains hearing testimony previously designated restricted.

Document	Response to Paragraph(s)	General Description
	¶ 798	Contains information previously designated restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.
	¶ 803	Contains hearing testimony previously designated restricted.
	¶ 806	Contains information previously designated restricted by other iHeartMedia and other participants. Contains hearing testimony previously designated restricted.
	¶ 807	Contains hearing testimony previously designated restricted.
	¶ 808	Contains information previously designated restricted by other iHeartMedia and other participants.
	¶ 810	Contains information previously designated restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.
	¶ 811	Contains information previously designated restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.
	¶¶ 812-814	Contains information previously designated restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.
	¶ 815	Contains information previously designated restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.

Document	Response to Paragraph(s)	General Description
	¶ 816	Contains information previously designated restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.
	¶ 817	Contains information previously designated restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.
	¶ 818	Contains information previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 819	Contains information previously designated restricted by iHeartMedia.
	¶ 819, n.20	Contains hearing testimony previously designated restricted.
	¶ 820	Contains information previously designated restricted by iHeartMedia.
	¶ 821	Contains hearing testimony previously designated restricted.
	¶ 822	Contains information previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 823	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 824	Contains information previously designated restricted by iHeartMedia.

Document	Response to Paragraph(s)	General Description
	¶¶ 825-826 & n.21	Contains information previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 827	Contains hearing testimony previously designated restricted.
	¶ 828	Contains information previously designated restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.
	¶ 829	Contains information previously designated restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.
	¶ 830	Contains information previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 831	Contains information previously designated restricted by iHeartMedia.
	¶¶ 833-841	Contains information previously designated restricted by iHeartMedia.
	¶ 842 & n.22	Contains information previously designated restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.
	¶ 843	Contains information previously designated restricted by other participants.

Document	Response to Paragraph(s)	General Description
	¶¶ 844-845	Contains information previously designated restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.
	¶ 846	Contains information previously designated restricted by iHeartMedia.
	¶¶ 847-851	Contains information previously designated restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.
	¶ 853	Contains information previously designated restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.
	¶ 854	Contains information previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 855	Contains information previously designated restricted by iHeartMedia.
	¶ 855, n.23	Contains information previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶¶ 856-857	Contains information previously designated restricted by iHeartMedia and other participants.
	¶ 858	Contains information previously designated restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.

Document	Response to Paragraph(s)	General Description
	¶¶ 860-863	Contains information previously designated restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.
	¶¶ 864-866	Contains information previously designated restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.
	¶ 867	Contains information previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 903	Contains hearing testimony previously designated restricted.
	¶ 904	Contains hearing testimony previously designated restricted.
	¶ 905	Contains hearing testimony previously designated restricted.
	¶ 912	Contains information previously designated restricted by iHeartMedia.
	¶ 920	Contains hearing testimony previously designated restricted.
	¶ 921	Contains deposition testimony previously designated restricted.
	¶ 925	Contains hearing testimony previously designated restricted.
	¶¶ 940-942	Contains information previously designated restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.
	¶ 948	Contains information previously designated restricted by other participants.

Document	Response to Paragraph(s)	General Description
	¶¶ 950-953	Contains information previously designated restricted by other participants.
	¶ 955	Contains information previously designated restricted by other participants.
	¶ 957	Contains information previously designated restricted by other participants.
	¶¶ 958-962	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 963	Contains information previously designated restricted by other participants.
	¶¶ 966-969	Contains information previously designated restricted by other participants.
	¶¶ 970-973	Contains information previously designated restricted by other participants.
	¶ 974	Contains information previously designated restricted by other participants.
	¶ 978	Contains hearing testimony previously designated restricted. Contains information previously designated restricted by other participants.
	¶ 979	Contains information previously designated restricted by other participants.
	¶¶ 980-982	Contains information previously designated restricted by other participants.
	¶ 990	Contains information previously designated restricted by other participants.

Document	Response to Paragraph(s)	General Description
	¶ 991	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 992-993	Contains information previously designated restricted by iHeartMedia.
	¶ 999	Contains information previously designated restricted by other participants.
	¶ 1015	Contains hearing testimony previously designated restricted. Contains information previously designated restricted by other participants.
	¶ 1016	Contains information previously designated restricted by other participants.
	¶ 1017	Contains hearing testimony previously designated restricted.
	¶¶ 1018-1019	Contains hearing testimony previously designated restricted.
	¶ 1018-1019, n.28	Contains hearing testimony previously designated restricted.
	¶ 1020	Contains hearing testimony previously designated restricted.
	¶ 1022 & n.29	Contains information previously designated restricted by iHeartMedia and other participants.
	¶¶ 1023-1025	Contains information previously designated restricted by other participants.
	¶ 1026-1029	Contains information previously designated restricted by other participants.
	¶ 1030 & n.31	Contains information previously designated restricted by other participants.
	¶ 1101	Contains hearing testimony previously designated restricted.

Document	Response to Paragraph(s)	General Description
	¶ 1103	Contains hearing testimony previously designated restricted. Contains information previously designated restricted by other participants.
	¶ 1105	Contains information previously designated restricted by iHeartMedia.
	¶¶ 1109-1110	Contains hearing testimony previously designated restricted. Contains information previously designated restricted by other participants.
	¶¶ 1115-1119	Contains information previously designated restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.
	¶¶ 1142-1143	Contains hearing testimony previously designated restricted.
	¶¶ 1145-1147	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 1173	Contains hearing testimony previously designated restricted.
	¶ 1175	Contains hearing testimony previously designated restricted.
	¶ 1176	Contains information previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶¶ 1178-1179	Contains information previously designated restricted by iHeartMedia.
	¶¶ 1182-1183	Contains hearing testimony previously designated restricted.

Document	Response to Paragraph(s)	General Description
	¶ 1184	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 1185	Contains information previously designated restricted by other participants.
	¶ 1189	Contains information previously designated restricted by iHeartMedia.
	¶ 1199	Contains information previously designated restricted by iHeartMedia and other participants.
	¶¶ 1209-1211	Contains information previously designated restricted by iHeartMedia.
	¶ 1241	Contains information previously designated restricted by iHeartMedia.
	¶ 1273	Contains information previously designated restricted by iHeartMedia.
	¶ 1288	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 1296	Contains information previously designated restricted by other participants.

Document	Page/Paragraph	General Description
Response to SoundExchange's Proposed Conclusions of Law	P. 4, ¶ 1	Contains hearing testimony previously designated restricted.
	P. 5, ¶ 1 & n.1	Contains information previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	P. 8, ¶ 2	Contains information previously designated restricted by other participants.
	P. 9, ¶ 1	Contains information previously designated restricted by other participants.
	P. 10, ¶ 1	Contains information previously designated restricted by other participants.
	P. 11, ¶ 1	Contains information previously designated restricted by other participants.
	Pp.12-13, ¶ 2 & n.9	Contains information previously designated restricted by iHeartMedia.

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